

# THE ‘REASONABLE TORT VICTIM’: CONTRIBUTORY NEGLIGENCE, STANDARD OF CARE AND THE ‘EQUIVALENCE THEORY’

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*The common law presumes, and Australian civil liability statutes dictate, that the reasonable person test is applied consistently, or equivalently, irrespective of whether the question is posed with respect to plaintiffs (for the purposes of determining contributory negligence) or defendants (for the purposes of determining liability in negligence). The reasonable person test is said to be purely objective. This article considers when it is necessary and, if so, appropriate, to modify the legal standard of care by imbuing the reasonable person with certain personal characteristics (whether that standard is applied to plaintiffs or defendants), and rejects the view that the reasonable person standard should always be applied equivalently (or uniformly) to defendants and plaintiffs. Instead, this article argues that, in some circumstances, it is appropriate that the personal characteristics of plaintiffs are taken into account to lower the requisite standard of care. Indeed, courts have used a variety of mechanisms to make such allowance in circumstances in which the same allowance would not be made for defendants.*

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## I INTRODUCTION AND OUTLINE

In the law of negligence, whether a person has failed to take reasonable care is determined by reference to the 'reasonable person'. At common law, in theory at least, the legal question of how the standard of the reasonable person is set should be answered consistently, irrespective of whether the question is posed with respect to plaintiffs (for the purposes of determining contributory negligence) or defendants (for the purposes of determining liability in negligence). Despite attempts by some judges to apply a different, subjective standard of care to plaintiffs,<sup>1</sup> the view has prevailed that plaintiffs must meet

<sup>1</sup> See, eg, *Cotton v Commissioner for Road Transport and Tramways* (1942) 43 SR (NSW) 66, 69 (Jordan CJ): a plaintiff need only 'take all such reasonable care as he is in fact capable of'. See also *Daly v Liverpool Corporation* [1939] 2 All ER 142, 143: we only need to 'do our reasonable best when we are walking about' (emphasis added). Such tests appear to set the standard entirely by reference to plaintiffs' subjective personal capacities. Reference to 'reasonableness' therefore appears superfluous.

an objective standard equivalent to that of defendants.<sup>2</sup> This is perhaps because of the evolution of contributory negligence from a complete defence to a comparative-fault defence.<sup>3</sup> However, some have cast doubts on whether the common law has been consistent in setting and applying standards of care.<sup>4</sup> Indeed, one commentator has demonstrated that Anglo-American common law does discriminate quite clearly in some contexts in setting different standards for the differing purposes of determining negligence and contributory negligence respectively.<sup>5</sup> It follows that, at common law, there is at best ‘presumptive symmetry’.<sup>6</sup>

In Australia, however, legislative changes to the law via the civil liability statutes of all Australian states (but not of the territories) would appear to demand (as opposed to presume) a consistent setting and application of the same standard as between defendants and plaintiffs.<sup>7</sup> These statutes provide that the principles applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm was contributorily negligent.<sup>8</sup> We call this the ‘equivalence theory’ of stand-

<sup>2</sup> See, eg, *McHale v Watson* (1966) 115 CLR 199, 213–15 (Kitto J); *Joslyn v Berryman* (2003) 214 CLR 552, 564–5 [32]–[34] (McHugh J). For early academic support, see Glanville L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, 1951) 353.

<sup>3</sup> See Kenneth W Simons, ‘Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law’ (2015) 8 *Journal of Tort Law* 29, 31: ‘The advent of comparative fault, replacing the all-or-nothing rule of contributory negligence, has made the symmetrical approach seem both inexorable and unremarkable.’

<sup>4</sup> *Review of the Law of Negligence* (Final Report, September 2002) 123 [8.11] (*Ipp Report*): ‘There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendants.’

<sup>5</sup> See Simons (n 3).

<sup>6</sup> See *ibid* 32. Presumptive symmetry applies only in the absence of ‘some special categorical rule’: at 44. Dorfman goes further and argues that asymmetry is widely accepted in United States jurisdictions, observing that ‘plaintiffs are for the most part assessed by reference to a subjective measurement of reasonable care’: Avihay Dorfman, ‘Negligence and Accommodation’ (2016) 22 *Legal Theory* 77, 79. That conclusion is not consistently agreed upon in the US when it comes to the consideration of victims’ mental disadvantage: at 119–21. However, Dorfman argues that such asymmetric standard is justified by the moral notion that tortfeasors ought to respect victims as they really are and ought to accommodate their conduct to the sensibilities of the victim: at 109–14.

<sup>7</sup> These changes follow from the *Ipp Report* (n 4). The relevant recommendations of that report are considered as appropriate throughout this article. In *Corr v IBC Vehicles Ltd* [2008] 1 AC 884, 909 [31], Lord Scott appears to have interpreted s 4 of the *Law Reform (Contributory Negligence) Act 1945*, 8 & 9 Geo 6 as similarly requiring equivalence; however, and with respect, this interpretation goes further than a natural reading of that provision supports.

<sup>8</sup> *Civil Liability Act 2002* (NSW) s 5R(1); *Civil Liability Act 2003* (Qld) s 23(1); *Civil Liability Act 1936* (SA) s 44(1); *Civil Liability Act 2002* (Tas) s 23(1); *Wrongs Act 1958* (Vic) s 62(1);

ard.<sup>9</sup> In all Australian states (other than South Australia), the statutes further provide that the standard of care required of the person who suffered harm is that of a reasonable person *in that person's position*, to be determined on the basis of what the person knew or ought to have known at the time — a purely objective 'reasonable person' test.<sup>10</sup>

The reasonable person — previously the 'reasonable man' or the 'man on the Clapham omnibus'<sup>11</sup> — is said 'to be free both from over-apprehension and from over-confidence',<sup>12</sup> and 'belong[s] to an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation by Roman jurists of the figure of the *bonus paterfamilias* [good family father]'.<sup>13</sup> Despite its appeal to ordinariness, the reasonable person's *character* is one that the law of negligence has struggled to define in a coherent and consistent way. In part, this is because the question of who the objective reasonable person is and what 'its' characteristics are must be answered to an extent by resort to intuition or assumptions as to the nature

*Civil Liability Act 2002* (WA) s 5K(1). The WA provision differs from the other statutes in one significant respect in that it states that the relevant principles that apply to a plaintiff are those that determine whether a defendant 'is liable for harm', rather than whether a defendant 'has been negligent' (see, eg, *Wrongs Act 1958* (Vic) s 62(1)) or whether a defendant 'has breached a duty' (see, eg, *Civil Liability Act 2003* (Qld) s 23(1)).

<sup>9</sup> Simons (n 3) 29, calls it the 'symmetrical' standard of care for victims and injurers whereas James Goudkamp calls it the 'transferability thesis' (that standards of care of defendants are transferable to plaintiffs, an approach that he rejects): James Goudkamp, 'Rethinking Contributory Negligence' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 309, 323, 327.

<sup>10</sup> *Civil Liability Act 2002* (NSW) s 5R(2); *Civil Liability Act 2003* (Qld) s 23(2); *Civil Liability Act 2002* (Tas) s 23(2); *Wrongs Act 1958* (Vic) s 62(2); *Civil Liability Act 2002* (WA) s 5K(2). However, *Civil Liability Act 1936* (SA) s 44 provides that the principles for determining negligence apply in determining contributory negligence. One such principle contained in s 31(1) provides for a comparable 'reasonable person' test.

<sup>11</sup> Although the historical use by lawyers of the 'reasonable man' test has been replaced by the widespread use of the label 'reasonable person', this should not hide the fact that gendered, and in particular male, views of the world are still embedded in the assessment of what such a standard entails: see, eg, Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3, 20–5. As Elizabeth Handsley states, the 'reasonable person' label 'merely serves to mask the maleness of the standard — to turn an explicit male norm into an implicit male norm': Elizabeth Handsley, 'The Reasonable Man: Two Case Studies' (1996) 1 *Sister in Law* 53, 61. Use of the label 'reasonable person' does highlight, however, that the requisite standard is abstract and removed from the real world, since it has to be given content by persons who will, invariably, bring their own, gendered life-experience and perspective to the table.

<sup>12</sup> *Glasgow Corporation v Muir* [1943] AC 448, 457 (Lord Macmillan).

<sup>13</sup> *Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service* [2014] PTSR 1081, 1084 [2] (Lord Reed).

of basic human responsibility. This question is an important one, but it is not the concern of this article.<sup>14</sup> Another reason that the law has struggled in this area is that the ‘reasonable’ person must perform multiple *roles* — defendant or plaintiff, adult or child, professional or not, and so forth. This article considers when it is necessary and, if so, appropriate, to modify the legal standard of care to account for these various roles — for example, by imbuing the reasonable person with certain personal characteristics — and rejects the view that the reasonable person standard should always be applied equivalently (or uniformly) to defendants and plaintiffs.<sup>15</sup> Instead, we argue that in some situations it is appropriate that the personal characteristics of plaintiffs are taken into account to lower the requisite standard of care.

Our argument unfolds in five stages. First, we examine whether it is *possible* to apply the same standard of care and the same process of reasoning when adjudging reasonableness in the context of negligence and contributory negligence, respectively (Part III). Secondly, we consider when issues relating to the setting of the standard of care (who the reasonable person is) arise at all (Part IV). Thirdly, where the setting of the standard of care is indeed at issue, we consider which (if any) personal characteristics of a party are taken into account as a matter of law to modify the standard of care (Part V). Since this exercise could, potentially, give rise to different answers in respect of plaintiffs and defendants, we consider fourthly and more generally whether the law does and should always treat plaintiffs and defendants equivalently when

<sup>14</sup> The process of reasoning engaged in when determining matters such as the reasonableness and normality of human behaviour is influenced by a range of factors, but includes ‘common sense’ views and ‘assumptions about the world and human behaviour’: see Kylie Burns, ‘Judges, “Common Sense” and Judicial Cognition’ (2016) 25 *Griffith Law Review* 319, 320. As Burns points out, however, there are serious shortcomings in ‘common sense’ reasoning, it being impacted by bounded rationality, heuristics, biases, emotion and cognitive illusions: at 328–39. Lord Neuberger has recently acknowledged the possible impact of cognitive bias and illusions: Lord Neuberger, ‘“Judge Not, That Ye Not Be Judged”: Judging Judicial Decision-Making’ (FA Mann Lecture, London, 29 January 2015) [24]–[29]. As to whether the negligence standard has a metaphysical dimension, see John Gardner, ‘The Negligence Standard: Political Not Metaphysical’ (2017) 80 *Modern Law Review* 1.

<sup>15</sup> The modification of the standard of care and whether that standard should be applied equivalently are overlapping issues. If different standards *are* applied as between plaintiffs and defendants, this may be achieved either by taking some personal characteristics into account for plaintiffs that are not necessarily relevantly taken into account for defendants, or by applying a lower standard for plaintiffs without reference to any personal characteristics at all. In some cases, judges have stated that a lower standard should apply to plaintiffs: see, eg, *Menzies J in McHale* (n 2) 223–4, who, dissenting, considered that age and other personal characteristics such as mental ‘defect’ and senility were relevant to assessing plaintiffs’ but not defendants’ negligence. In other cases, judges have suggested that an almost subjective standard should apply: see, eg, n 1.

setting the standard, with particular reference to conflicting case law on whether a plaintiff's disability is a relevant factor (Part VI). Fifthly, and finally, we consider whether — even if the standard is set and applied equivalently when determining negligence and contributory negligence — courts might nonetheless apply a different standard of care to plaintiffs when apportioning damages (Part VII).

In addressing these issues, our primary interests are in the practicability of, and possible justifications for, applying equivalent standards; whether there are generally applicable legal principles in the law of negligence itself that justify equivalent or non-equivalent treatment; and, if such principles exist, how the law might give effect to them. We accept, however, that courts might be motivated by other reasons. For example, one motivating reason for applying a *lower* standard of care for plaintiffs might be plaintiff-friendly bias — that is, broader motives of distributive justice, the fact that defendants' liabilities are covered by insurance, sympathy for needy plaintiffs, and similar (perhaps entirely justifiable) reasons. Underlying motives such as these might also explain a number of judgments in this area; however, in such cases, judges cannot justify their conclusions openly, given the framework within which our current law operates.

Before we move onto these five tasks, however, we consider some preliminary matters that do not raise the issue of when the legal standard of care is, or ought to be, modified, but which are nonetheless critical to properly framing and analysing those issues.

## II COMMON AND DISTINGUISHING FEATURES OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE

Negligence is a failure of a person to take reasonable care, which failure causes damage to another, and is judged by reference to (1) the foreseeability (and, in most Australian jurisdictions, the probability) of the risks that have eventuated and (2) the calculus of negligence (set out below). A prerequisite for liability in negligence is that a defendant owes a *duty* of care to the plaintiff to avoid such risks. In contrast, contributory negligence is a failure on the part of a plaintiff to take reasonable care for his or her own safety, where such failure is a cause of the damage or harm suffered by the plaintiff.<sup>16</sup> Plaintiffs do not

<sup>16</sup> We do not consider the relationship between 'contributory negligence' and 'mitigation of damages' and where, precisely, the boundaries between them can be drawn (if at all). For one attempt to distinguish them, see Goudkamp, 'Rethinking Contributory Negligence' (n 9) 330–2.

owe a ‘duty’ to themselves in the sense that defendants owe a duty to plaintiffs — that is, a duty that correlates with the infringement of another’s rights.<sup>17</sup> Rather, as Simons puts it, plaintiffs owe ‘a *conditional* legal duty to act with reasonable care, if [they seek] to obtain full compensatory damages for injuries that another has tortiously caused.’<sup>18</sup> If a plaintiff breaches this conditional legal ‘duty’ then he or she is precluded from making a full claim for damages against a defendant, but no claim arises against that plaintiff by a third party.

Whereas it is therefore possible to draw a clear distinction between the ‘duties’ owed relevantly by plaintiffs and defendants, conventional accounts of the breach enquiry consist of the same two broad stages regardless of whether it is applied to plaintiffs or defendants: (1) Who is the ‘reasonable person’ in the person’s position? (2) Would that reasonable person have acted or failed to act as the person did in the circumstances? The first stage merely describes the ‘reasonable person’ (a ‘reasonable doctor’, a ‘reasonable five-year-old child’ and so forth). Such descriptions provide the measure by which that person’s conduct falls to be assessed. In contrast, the second stage prescribes how a person ought to have acted by reference to the standard identified at the first stage. The enquiries at both stages are normative in nature. However, whereas the normative questions that arise at the first stage are essentially legal in nature (‘ought the description of the reasonable person to be modified for X characteristic/factor?’),<sup>19</sup> the normative questions that arise at the second stage are essentially factual in nature (‘was the person’s conduct reasonable in the circumstances?’). Confusingly, the term ‘standard of care’ may be used to refer to either of these stages alone or to both of these stages collectively. In order to minimise any such confusion, we refer here to the first stage as

<sup>17</sup> See *McHale* (n 2) 230 (Owen J); Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 32.

<sup>18</sup> See Simons (n 3) 50 (emphasis in original).

<sup>19</sup> John Gardner argues that the standard of the reasonable person is an ‘extra-legal’ standard, which allows ‘the law to pass the buck, to help itself *pro tempore* to standards of justification that are not themselves set by the law’: John Gardner, ‘The Many Faces of the Reasonable Person’ (2015) 131 *Law Quarterly Review* 563, 564, 568; see also at 572–3. Gardner therefore considers the question of reasonableness as essentially one of fact with only limited legal input. This view is not inconsistent with our view that determining the requisite standard of care itself is a matter of law. Gardner’s focus is on the application of the standard, and he accepts that when the standard is modified (eg to that of a reasonable doctor) that appeal to an assessment made from a different standpoint involves legal input and legal questions. In other words, although the application of the new standard is as factual as was application of the old standard, how the law describes that new standard is a legal matter: see especially at 575.

'setting the standard' ('who is the reasonable person?'), and the second stage as 'applying the standard' (by reference to the 'calculus of negligence').

Both at common law and under the statutes, the calculus of negligence requires that the reasonableness of a person's conduct be judged by reference to all the circumstances of the case. In other words, the reasonable person is placed in the shoes of the plaintiff or defendant and the specific factual circumstances in which they find themselves. The *Ipp Report* specifically recommended that the same factors should be considered when determining contributory negligence as when determining negligence:

- (c) In determining whether a person has been contributorily negligent, the following factors (amongst others) are relevant:
  - (i) The probability that the harm would occur if care was not taken.
  - (ii) The likely seriousness of the harm.
  - (iii) The burden of taking precautions to avoid the harm.
  - (iv) The social utility of the risk-creating activity in which the person was engaged.<sup>20</sup>

The civil liability statutes have incorporated the requirement that the same standard of care be applied to plaintiffs as to defendants. For example, the *Civil Liability Act 2002* (NSW) s 5R(1) states that

[t]he principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

However, none of the Australian statutes expressly repeat these factors in their contributory negligence provisions prescribing equivalence, and it has been 'observed that neither the purpose nor the operation of [at least some of those statutory] provision[s] is self-evident', so that it is necessary to turn to relevant parts of the *Ipp Report* for guidance as to their meaning.<sup>21</sup> In our view,

<sup>20</sup> *Ipp Report* (n 4) 13 recommendation 30. For an interesting variation on the symmetry argument, but arguing that both defendants' and victims' standards ought to be assessed subjectively according to personalised standards of the parties, see Omri Ben-Shahar and Ariel Porat, 'Personalizing Negligence Law' (2016) 91 *New York University Law Review* 627. It is outside the scope of this article to consider Ben-Shahar's and Porat's thesis, but we would observe that many of the factors that the authors identify as increasing defendants' standard of care are ones that we consider to be part of the 'circumstances' and activities to which an objective legal standard is applied, and not as a subjective personalisation of that standard.

<sup>21</sup> *Town of Port Hedland v Hodder* [No 2] (2012) 43 WAR 383, 433 [210] (Martin CJ) ('*Hodder*') considering the WA provisions (*Civil Liability Act 2002* (WA) s 5K), citing *Council of the City*



however, the *Ipp Report* does not give any useful guidance as to what is meant by applying the ‘same’ standard of care and process of reasoning to both plaintiffs and defendants. At best, many of the statements leading to this recommendation are cryptic. The *Ipp Report* does not explain: how equivalent standards are to be applied in practice; what consequences flow from this approach; whether any (and if so which) existing laws are now invalid; or whether certain earlier cases might, were they to arise today, be decided differently as a result.<sup>22</sup> Evidently, however, the authors of the *Ipp Report* believe that it is *possible* to apply the same analytical process to determine the reasonableness or otherwise of plaintiffs’ and defendants’ conducts, and the next section tests the accuracy of this belief before proceeding further.

### III IS IT POSSIBLE TO APPLY THE CALCULUS OF NEGLIGENCE TO DEFENDANTS AND PLAINTIFFS ALIKE?

In many commonplace scenarios, the calculus of negligence may be applied to plaintiffs’ conduct with ease, and in a manner that is sensitive to subtle variations in circumstance. It seems clear, for example, that an adult plaintiff would not be found contributorily negligent in attempting to save a life, say, by running in front of a car to rescue a toddler, whereas one who ran in front of a car to fetch a ball would. This is because of the considerable social utility or justifiability in saving a life.<sup>23</sup> However, when the standard to be applied is that of the reasonable person in the position of the *plaintiff*, the calculus of negligence may be difficult to apply or of limited assistance. As pointed out by Basten JA in *Council of the City of Greater Taree v Wells*, the exercise of determining whether (for instance) a bicycle rider has been contributorily negligent cannot be identical to that of determining negligence in the case of a defendant such as a local council charged with the management of a park.<sup>24</sup> To do so, his Honour explains, ‘would be to impose an artificial and convoluted intellectual exercise on the trial judge to assess [the plaintiff’s negligence] by reference to the matters considered under’ the calculus of negligence

*of Greater Taree v Wells* (2010) 174 LGERA 208, 231 [105] (Basten JA), considering the NSW provisions (*Civil Liability Act 2002* (NSW) s 5R).

<sup>22</sup> *Ipp Report* (n 4) 123 [8.11] n 4 does cite cases or judges that have stated that a lower standard of care should apply to plaintiffs, being *Pollard v Ensor* [1969] SASR 57; *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563, 577–8 (Murphy J); *Cocks v Sheppard* (1979) 25 ALR 325; *Watt v Bretag* (1982) 41 ALR 597; *Evers v Bennett* (1982) 31 SASR 228.

<sup>23</sup> This section draws on Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2017) 359–91 [6.2.1]–[6.2.59], written by one of the joint authors.

<sup>24</sup> *Greater Taree* (n 21) 231–3 [105]–[113].

factors.<sup>25</sup> The underlying difficulty is that, although the purpose of both exercises is to determine whether a party has failed to take reasonable care, the focus of the exercise when determining a defendant's liability is on matters of objective fact, whereas in assessing a plaintiff's conduct there will often be a more natural 'focus upon the knowledge, understanding and actions of the plaintiff himself'.<sup>26</sup> For this reason, the calculus of negligence factors will often not assist in determining whether a plaintiff was contributorily negligent, and the courts accept that it is not necessary 'that each of those factors needs to be satisfied seriatim by way of a check list'.<sup>27</sup>

Other examples can be given of the difficulties of applying the calculus to plaintiffs; importantly, however, these examples apply equally to defendants. Take, for example, the absent-minded plaintiff. An absent-minded person does not, by definition, engage in any evaluation of risk whatsoever. Thus, the only question to which the calculus of negligence could be directed (unless we are to conclude out-of-hand that the plaintiff was contributorily negligent) is to the narrower, somewhat artificial question of whether a reasonable person would have paid greater attention in the circumstances — that is, whether it was negligent to be absent-minded. It is also doubtful that the calculus of negligence could be applied in respect of plaintiffs who are faced with a sudden emergency. This is because a reasonable person is not expected to evaluate foreseeable risks in a calculated manner when confronted with a sudden emergency. It simply make no sense, therefore, to ask what a reasonable person would have done had he or she been in the position (which the plaintiff was not) to properly weigh the magnitude of harm against the burden of taking precautions.

In both of these scenarios, and perhaps in others, the application of the calculus of negligence is at best cosmetic. But these difficulties are neither exclusive to contributory negligence nor exacerbated by the equivalence theory. In other words, these problems of artificiality arise when applying the calculus to the conduct of *both* plaintiffs and defendants. Defendants may also cause harm through inattentiveness rather than calculated action, and, for reasons that it is now convenient to explain in more detail, there is no reason in principle why the existence of a sudden emergency should be of relevance only to plaintiffs.

<sup>25</sup> Ibid 232 [109].

<sup>26</sup> Ibid 232 [108].

<sup>27</sup> *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72, [173] (Beazley P); see also at [162].

#### IV WHEN DO ISSUES RELATING TO SETTING THE STANDARD OF CARE ARISE AND WHEN DO THEY NOT?

##### A *The (Broad) Distinction between Setting the Standard and Identifying the Circumstances*

The basic structure of the breach enquiry, outlined in Part II, suggests that a broad distinction might be maintained between: (1) setting the standard of care in some cases, by modifying the objective standard; and (2) the ‘circumstances’ in which the parties operate (such as time, location, and so forth), which are generally only relevant when applying the standard. The purpose of this part is to determine when a factor must, if it is to be taken into account at all, modify the standard of care, and when, in contrast, it is possible and appropriate to frame a factor as part of the circumstances.

##### B *Factors External to the Parties*

In our view, factors external to the parties themselves, such as the time, place and prevalent conditions when an accident occurred, are only ever relevant as a matter of fact in applying (and not in setting) the standard. For example, the fact that a road accident occurred on a wild, wet and stormy night means that the reasonable driver standard is applied in that factual matrix: would a reasonable driver have slowed down, for example, in those prevailing conditions? As a semantic matter, of course, we could pose the question in a way that seems to suggest a modification of the standard — a legal question — by positing the question as ‘what would a (reasonable) wet weather driver do?’ However, we do not accept that this is anything other than a semantic convenience: it does not raise a legal question as to the content of any modified standards. In other words, there is no need to answer a generalised legal question concerning the characteristics personal to the particular driver with which we will imbue this reasonable person.

It follows that the so-called ‘sudden emergency’ doctrine — often articulated as if it were a free-standing doctrine that modifies the standard of care, most commonly in respect of plaintiffs — is no such thing, and does not raise any legal issues as to the setting of the standard of care.<sup>28</sup> This doctrine merely

<sup>28</sup> The ‘sudden emergency doctrine’ is also known as the doctrine of alternative danger or the rule in *The Bywell Castle* (1879) 4 PD 219 (CA). That case concerned a shipping collision. Cotton LJ stated the rule as follows, at 228: ‘a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the default or negligence of another vessel, he does something which he might under the circum-

requires that impugned conduct be assessed from the perspective of the person confronted with the emergency and not from the perspective of those adjudicating 'with a knowledge of all the facts, and with time to consider them'.<sup>29</sup> Statements such as this simply highlight one (not uncommon) factor that might be relevant when *applying* the standard of care.<sup>30</sup> As such, and notwithstanding possible authority to the contrary,<sup>31</sup> there is no obvious reason why the existence of a sudden emergency ought to be relevant only in respect of a plaintiff's conduct.<sup>32</sup> Certainly, there are cases in which a defendant's conduct has been deemed reasonable because of the emergency context in which it arose,<sup>33</sup> and this approach seems correct, particularly in the light of the legislative changes noted above.

stances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best'. As is evident from this quote, the principle is not stated as being concerned only with *contributory* negligence, and in *The Bywell Castle* the statement was made with reference to the defendant who was also a cross claimant, and was found not negligent.

<sup>29</sup> *Ibid.*

<sup>30</sup> See Simons (n 3) 37–8. An exception arises, perhaps, when that emergency is itself an outcome of the defendant's negligence.

<sup>31</sup> See, eg, *Shelley v Szelley* [1971] SASR 430 (sudden blowout of tyre; passenger grabbing wheel; defendant driver negligent, but passenger plaintiff not); *Wels v McGrath* (1973) 47 ALJR 324 (sudden blowout of tyre; defendant driver negligent in driving or allowing car to travel over gravel slope).

<sup>32</sup> See, eg, *Jones v Boyce* (1816) 1 Stark 493; 171 ER 540. More recently, see, eg, *Grills* (n 27), in which a police officer was held not to have been contributorily negligent when his motorbike hit an unexpected boom gate when travelling at 10–15 km/h above the speed limit, while responding to an urgent situation. As Simons observes, 'the agony of the moment rule is essentially an application of the general rule or policy, which applies to injurer negligence as well, that the standard of care takes into account the surrounding circumstances': Simons (n 3) 37–8.

<sup>33</sup> See, eg, *Scholz v Standish* [1961] SASR 123 (driver stung by bee not negligent); *Smith v Lord* [1962] SASR 88 (defendant driver who suffered a temporary loss of vision and accelerated instead of braking deemed not negligent); *United Uranium NL v Fisher* [1965] ALR 99 (one defendant exonerated where emergency created by another defendant); *Abdallah v Newton* (1998) 28 MVR 364 (NSWCA) (plaintiff, passenger in vehicle with which defendant collided, not entitled to damages, since defendant acted reasonably in seeking to escape from threatened attack in incident of 'road rage'); *Winiarczyk v Tsirigotis* (2011) 58 MVR 98 (WASCA) (defendant taxi driver not negligent in reacting to pedestrian propelling himself into taxi's path by braking sharply, causing whiplash to passenger). Cf *Leahy v Beaumont* (1981) 27 SASR 290 (driver suffering severe coughing fit negligent for failing to take alleviating action prior to losing consciousness). In sports and games, defendants are only required to meet the standard of care that can be expected in the circumstances, including the rules and conventions of the game: see, eg, *Rootes v Shelton* (1967) 116 CLR 383; *Pollard v Trude* [2009] 2 Qd R 248.

It is true that courts may on occasion appeal to the agony of the moment as a means of surreptitiously adjusting the standard of care expected — of plaintiffs in particular — rejecting contributory negligence despite the fact that a reasonable person in the circumstances would have acted so as to avoid the risk.<sup>34</sup> However, it would be better in our view, if such allowances are to be made, that the reasons for those allowances were articulated clearly as factors that modify the standard of care as a matter of law.

### *C Personal Characteristics May Form Part of the Circumstances*

How, then, do the personal characteristics of the plaintiff or defendant (such as gender, age, disability, special skills and so forth), and the nature of the activity in which the plaintiff or defendant is engaged (such as driving, surgery and so forth) fit into the broad distinction between setting the standard and identifying the circumstances?

Personal characteristics may be relevant both as a matter of law in *setting* the standard, but also in applying the standard (as part of the circumstances). Indeed, it is central to the arguments advanced in this article that courts often face a *choice* as to whether to describe a person's characteristic as forming part of that person's position or circumstances (the context of the accident) on the one hand, or as a feature of the reasonable person on the other.<sup>35</sup> There is no reason in logic, for example, why the question 'What would a reasonable one-armed person do in the circumstances?' should be preferred to the question 'What would a reasonable person do if, in the circumstances, he or she had only one arm?' The phrasing adopted might nevertheless prove important because, by treating a specific characteristic as a circumstance when applying the standard of care (a question of fact), a court may effectively sidestep the need to determine whether that kind of characteristic can or cannot be attributed to the reasonable person when setting the standard of care (a question of law).<sup>36</sup>

<sup>34</sup> '[W]here the [defendant] had created the danger they ought not to be minutely critical of what the [plaintiff] had done when faced with the danger created by them': *Gibson v West Lothian Council* [2011] Rep LR 84, 86–7 [60].

<sup>35</sup> As Balkin and Davis observe, '[t]he definition of the reasonable person is not complete unless the words "in the circumstances" are embodied. Plainly, these words may prevent the test from being wholly objective, for the boundary between the external facts and the qualities of the actor is ill defined': RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2013) 276 (citations omitted).

<sup>36</sup> In *Smith* (n 33), for example, the Court simply and legitimately asked whether, as a matter of fact, a reasonable driver suffering from a sudden (and unforeseeable) loss of vision would

When is it appropriate, then, to describe a personal characteristic as a circumstance? It seems to us that this depends on how, precisely, the characteristic in question is said to be relevant. This, in turn, depends on the way in which the defendant pleads the contributory negligence defence.

Personal characteristics of any variety may be said to bear upon the reasonableness of a person's conduct in at least two ways: (1) by limiting a person's *capacity* to make decisions, appreciate risks or respond to risks (including a person's physical capacity to respond to risks), in which case we would argue that the characteristic must always, if it is to be taken into account, modify the standard of care — the reasonable five-year-old, the reasonable person suffering an intellectual disability (if that were accepted), and so forth; and (2) by impacting upon what that person should do by way of a reasonable response to risks, in which case that characteristic is generally best framed as a circumstance (knowledge) that the *unmodified* reasonable person takes into account when deciding how that person (knowing of their illness or pregnancy, for example) should respond. These propositions are best illustrated by way of a hypothetical example:

*Example 1: Risk-Taking Activity*

P, who suffers from physical disability, proceeds to ski down an intermediate ski slope. D's negligent grooming of the slope means that P hits an object. A more able-bodied skier would likely have been able to avoid the obstacle.

Here, if D argued that P was negligent in deciding to ski down the intermediate slope, despite her limited physical capacities,<sup>37</sup> then P's limitations do not lower the standard of care expected of her. P's contributory negligence (if so found) is characterised as the *decision* itself to ski down the intermediate slope. In applying the standard of care, we would ask whether a reasonable skier, knowing that she had a disability, would decide to ski down that slope.<sup>38</sup> If P's decision to ski down the slope appears reasonable, however, and D therefore pleads that P failed, unreasonably, to avoid the object, then P's disability cannot be described as a circumstance. Rather, if P's disability is to

have applied his or her brakes. The Court did not ask whether a sudden loss of vision was a characteristic that could be attributed to the reasonable person as a matter of law. See also *Waugh v James K Allan Ltd* 1964 SLT 269.

<sup>37</sup> In order to avoid unnecessary complexity, and to aid readability, hypothetical plaintiffs are identified in this article as female and hypothetical defendants are identified as male.

<sup>38</sup> The answer to that question would depend on factors such as whether the slope is open to disabled people, or whether P was a member of a group guided by a supervising employee of the ski slope operator.

be taken into account at all in answer to D's pleading, then either: (1) the standard of care must be modified (which for reasons explained in Parts V and VI, we believe it should be); or (2) D's duty to P must be framed as a 'protective duty', such that the scope of D's duty extends to protecting P against the risk that P might fail to take reasonable care of her own safety.

#### D *Personal Characteristics and Allen v Chadwick*

These conclusions are consistent with the way in which the High Court treated personal characteristics in *Allen v Chadwick*.<sup>39</sup> In that case, the plaintiff was seriously injured when she was thrown from a car that was being driven negligently by the defendant.<sup>40</sup> The plaintiff had known she was pregnant for nine or ten weeks prior to the time, and the defendant (her boyfriend) and another male passenger had been drinking heavily throughout the day. The plaintiff had been driving the group earlier that evening, but after stopping briefly to urinate she returned to the car to discover the defendant in the driver's seat. The trial judge determined that, at the time, the plaintiff had no idea where she was, and that it was 'just black. Literally black'.<sup>41</sup> An altercation ensued during which the plaintiff told the defendant not to drive, but the defendant insisted that she get into the car, which she did.

The defendant alleged that the plaintiff had been contributorily negligent — relevantly, for our purposes, in entering the car when she ought to have known that the driver was intoxicated.<sup>42</sup> This ground was based on specific statutory rules contained within the *Civil Liability Act 1936* (SA), which impose a rebuttable presumption of contributory negligence if the plaintiff knew or ought to have known that the defendant was intoxicated.<sup>43</sup> The High Court unanimously accepted that the presumption imposed by s 47(1) was rebutted on the basis that the plaintiff 'could not reasonably

<sup>39</sup> (2015) 256 CLR 148.

<sup>40</sup> The following summary of relevant facts is adapted from *ibid* 153–5 [8]–[19].

<sup>41</sup> *Ibid* 155 [16].

<sup>42</sup> *Ibid* 153 [2]. It was also alleged that the plaintiff was negligent in failing to secure her seatbelt, giving rise to a presumption of contributory negligence under *Civil Liability Act 1936* (SA) s 49(1)(a) because 'the injured person was not, at the time of the accident, wearing a seatbelt as required under the *Road Traffic Act 1961*': at 153 [2]. On this aspect of the appeal, the plaintiff's argument that she was prevented from fastening her seatbelt by the defendant's driving was rejected on the basis of the trial judge's findings of fact to the contrary: at 169–70 [69].

<sup>43</sup> *Civil Liability Act 1936* (SA) s 47(1).

be expected to have avoided the risk<sup>44</sup> of getting into the car with the defendant.<sup>45</sup>

Importantly, in concluding that the plaintiff acted reasonably, the High Court stressed that, as a young, pregnant woman, she was entitled to take the risk of entering the car with a drunk driver in order to avoid the alternative dangers of walking alone in the dark to her accommodation. In the circumstances, it was reasonable for the plaintiff not to have known precisely how far she was from town.<sup>46</sup> In reaching this conclusion, however, the High Court did not appear to modify the standard of care to that of a young pregnant woman; rather, it asked what a reasonable person, who happens to be young and pregnant (and who is likely to be abandoned), would do in the circumstances.<sup>47</sup> In other words, the plaintiff's pregnancy was a factual circumstance, not a personal characteristic that modified the standard of care.<sup>48</sup> Similarly, the driver's domineering and aggressive behaviour formed part of those relevant circumstances.

This interpretation of the High Court's reasoning is supported by the joint judgment's discussion of a hypothetical example:

[I]f a person suffering from a medical condition, and subject to episodic disabling symptoms, were to be confronted with the choice of an arduous trek out of a wilderness as the only alternative to accepting a lift with a drunk driver, that person might reasonably choose to accept the lift rather than be left at the risk of the occurrence of the episode in the wilderness where he or she would have no recourse to assistance; whereas a risk-laden decision by the same person to accept a lift with a drunk driver in a busy urban area would not be 'reasonable' simply because it was made while the person was, because of stress associated with a particular episode, prevented from making a reasonable evaluation of the relative risks. That is to say, the circumstance that a person is inca-

<sup>44</sup> Ibid s 47(2)(b).

<sup>45</sup> *Allen* (n 39) 167 [61]. Strictly speaking, the ratio of the case may be limited to the meaning of 'reasonableness' under s 47(2), but the approach articulated by the High Court is clearly intended to apply generally to the standard of care in negligence and contributory negligence alike. This is because, as the High Court explains, s 44(1) of the Act 'precludes any suggestion that the reasonable care and skill expected of a plaintiff for the protection of his or her own interests is something different from the reasonable care and skill expected of a defendant for the protection of the interests of others': at 156 [22].

<sup>46</sup> Ibid 165–6 [57]–[59].

<sup>47</sup> Ibid 167 [61].

<sup>48</sup> In what way the plaintiff's *gender* was implicitly taken in account in this analysis, or whether this modified the standard of care, are questions that the High Court did not address in its judgment.



pable of making a reasonable decision at the relevant time has no bearing on the reasonableness or otherwise of the decision actually made.<sup>49</sup>

The High Court also categorically rejected an argument that the plaintiff should be judged according to the standard of someone suffering from ‘feelings of helplessness and panic,’<sup>50</sup> stressing that the rejection of a plaintiff’s ‘subjective mental or emotional state’ as a relevant consideration is consistent with the common law position.<sup>51</sup>

In summary, personal characteristics may legitimately be framed as part of the ‘circumstances,’ provided that the reasonable person in the position of the person would take the existence of that characteristic into account in making a decision. So framed, the characteristic in question does not modify the standard of care to that of a reasonable person exhibiting those personal characteristics, but rather forms part of the factual matrix within which that person operates. Whether it is appropriate to take account of physical characteristics in other ways, so as to modify the standard of care, is much more controversial and is discussed in Parts V and VI. But whatever view is taken on such matters, it seems to us highly doubtful, especially in the light of *Allen v Chadwick*, that when a characteristic affects a person’s *capacity to reason*, or to respond to or appreciate a risk (such as a mental disability or infirmity), it could ever be described as a ‘circumstance’. This is because to take account of a person’s capacity in any of these respects is to depart from the objective standard of the reasonable person, and any such departure must clearly be justified as a matter of law (when setting the standard of care).

### E *The Nature of the Activity May Modify the Standard of Care*

In some instances, the description of the ‘reasonable person’ might also be modified by the nature of the activity that a person engages in.<sup>52</sup> For example,

<sup>49</sup> *Allen* (n 39) 164 [51].

<sup>50</sup> *Ibid* 163 [49].

<sup>51</sup> *Ibid* 164 [52]. Rather oddly, the High Court supported that conclusion by citing the well-known obiter statement of McHugh J in *Joslyn*. In that case, McHugh J opined that *physical* characteristics such as ‘defective hearing or sight’ are idiosyncratic and hence irrelevant, and would not therefore excuse a pedestrian or motorist who enters a railway crossing in circumstances where he or she should have been aware of an oncoming train: *Joslyn* (n 2) 567 [39]. We criticise this view further below, but note for now that McHugh J’s conclusion may be inconsistent with other cases that have taken such physical disability into account.

<sup>52</sup> To be clear, the nature of the activity engaged in is always factually relevant (eg playing with a ball); however, courts do not routinely modify the description of the reasonable person to take account of that activity (eg the ‘reasonable ball player’) unless it assists the court in

the standard of care might be modified to that of a 'reasonable surgeon' or a 'reasonable road user'.<sup>53</sup> However, crucially, when the nature of the activity engaged in modifies the description of the reasonable person, it does so by reference to the general characteristics of those who engage in that activity, irrespective of the specific personal characteristics of the plaintiff or defendant.<sup>54</sup> Thus, the conduct of a person who engages in surgery (an activity) in the ordinary course will be assessed against the standard of a reasonable surgeon, irrespective of whether they were *in fact* properly trained.

When the nature of the activity is taken into account in setting the standard of care, the burden placed on the person who engaged in that activity is often increased.<sup>55</sup> In contrast, when a personal characteristic is taken into account, the burden on the relevant person is often decreased. This is so, for example, with young age, physical disability or, if it were accepted as relevant, mental disability. Increased standards of care that are expected because of a person's activity (presuming it is voluntarily undertaken) are not generally controversial as a modification of standard, equivalently for both plaintiffs and defendants. Indeed, activities may even trump other factors, such as age. Thus, a 15-year-old who decides to drive a car will be held to the standard of the reasonable, competent and licensed driver, despite the fact that this is plainly not a standard that most 15-year-olds are capable of meeting.<sup>56</sup> Our primary concern from hereon is therefore with the far more controversial

evidentiary terms to do so. In such everyday contexts, the 'expert' is simply the court itself (historically a jury). In contrast, when the standard is described as that of a 'reasonable doctor', for example, the court is able take account of the standards (customary, legislative, regulatory or otherwise) that bear upon 'reasonableness' in that narrower group. See also the conclusions of Gardner on this point: Gardner, 'The Many Faces of the Reasonable Person' (n 19) 576 (conclusions we take to be broadly consistent with our own).

- <sup>53</sup> We accept, of course, that the 'reasonable surgeon' is a subset of human characteristics — that is, it is not a characteristic of reasonable people in general.
- <sup>54</sup> See *Wells v Cooper* [1958] 2 QB 265, 271; Barbara McDonald, 'Standard of Care' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts*, (Lawbook, 10<sup>th</sup> ed, 2011) 123, 128–30.
- <sup>55</sup> See Gardner, 'The Many Faces of the Reasonable Person' (n 19) 577: 'the enhanced reasonable persons normally exist to set *higher* standards of justification so far as the relevant specialised pursuits are concerned' (emphasis in original).
- <sup>56</sup> See *Tucker v Tucker* [1956] SASR 297; *McErlean v Sarel* (1987) 42 DLR (4<sup>th</sup>) 577; *Imbree v McNeilly* (2008) 236 CLR 510. See also *McHale* (n 2) 205–6, 208 (McTiernan ACJ), quoting: Fowler V Harper and Fleming James Jr, *The Law of Torts* (Little, Brown, 1956) vol 2, 926–7; John G Fleming, *The Law of Torts* (Law Book, 3<sup>rd</sup> ed, 1965) 117–18. McTiernan ACJ notes that the child's standard will be that of the reasonable (adult) driver. Presumably, this would only be so where the child is capable of understanding his actions and is driving on a public road. Contrast a child driving on a private driveway: *Zanner v Zanner* (2010) 79 NSWLR 702.

question of when personal characteristics of a party might modify the required standard of care of that person, ordinarily for the purpose of decreasing it.

#### F *Contributory Negligence May Be Denied for Policy Reasons*

Another scenario in which issues relating to setting the standard of care, and the application of an equivalent standard, may not arise, is where policy dictates that the plaintiff's conduct should not be assessed by reference to reasonableness — that is, the plaintiff will not be held responsible (by a reduction of damages) for a failure to take care for her safety. Simons labels such policy-based exemptions to the contributory negligence defence as 'plaintiff no duty' rules.<sup>57</sup> He gives the example, based on US cases, that a victim of crime, suing a defendant for negligently failing to safeguard against such risks, cannot be said to have been contributorily negligent for walking in a dangerous area. In Simons's view, '[t]he compelling policy of respecting each citizen's liberty of movement justifies imposing a categorical rule that plaintiff is not negligent, rather than leaving to the trier of fact the ad hoc judgment whether the victim's decision to subject herself to some risk of harm was "unreasonable".'<sup>58</sup> Goudkamp also believes that policy plays an important role in denying contributory negligence,<sup>59</sup> and identifies one such policy as exempting plaintiffs where the defendant has breached a statutory duty to protect against that risk, such as in failing to install appropriate safety equipment.<sup>60</sup>

Undoubtedly, some policies exempting plaintiffs from contributory negligence exist; however, they are rarely expressly articulated as such, are uncertain in scope, and are sometimes difficult to distinguish from other means by which courts avoid findings of contributory negligence. For these reasons, some of the policy-based exemptions that Goudkamp identifies are not, in our view, convincing as reflecting some generally applicable 'rule'. In *Keam v*

<sup>57</sup> Simons (n 3) 40.

<sup>58</sup> Ibid.

<sup>59</sup> Goudkamp argues that this is given effect via an additional third stage that applies to all contributory negligence issues, rather than the generally accepted two-stage test of (1) carelessness and (2) a causal connection between the plaintiff's carelessness and the damage suffered: Goudkamp, 'Rethinking Contributory Negligence' (n 9) 314–23. Goudkamp describes that third stage in the following terms, at 314: 'there are no considerations of public policy that render the doctrine of contributory negligence inapplicable'.

<sup>60</sup> Ibid 315.

*Chiomey bnf Mercer*,<sup>61</sup> for example, a child had cycled part way onto a pedestrian crossing when he was struck by a truck. The child was held not to be contributorily negligent. However, Goudkamp argues that the child was clearly negligent in failing to pause before proceeding to cross despite being aware of the truck, and concludes on this basis that the case supports a wider policy that parties enjoying a right of way under road rules are exempt from contributory negligence because these rules take precedence.<sup>62</sup>

With respect, we doubt whether cases such as *Keam* can be extrapolated into general rules or policies.<sup>63</sup> It seems more likely that, in cases such as *Keam*, as in other cases,<sup>64</sup> courts have simply stated factual conclusions of no contributory negligence in order to avoid the difficulties associated with modifying the standard of care or articulating a protective duty.<sup>65</sup> To be sure, those cases may reflect an indulgence towards a plaintiff, whose 'fault' is being compared to a clearly negligent defendant, and this indulgence may implicitly involve an application of a lower standard. However, any such lowering of the standard of care occurs without the courts expressly articulating a legal position of non-equivalent standards, or any generally applicable policy.

Related to the difficulties in articulating when such policies exist, and the precise scope of such policies, is the overlapping issue of protective duty relationships. In some circumstances, plaintiffs are not expected to take care of their own safety to the standard of a reasonable, objective person, because the scope of the defendant's duty extends to protecting the plaintiff precisely against that risk. Numerous examples can be given, such as where a prison

<sup>61</sup> [2002] NSWCA 280.

<sup>62</sup> Goudkamp, 'Rethinking Contributory Negligence' (n 9) 318. In fact, the evidence was not clear on this point; the court accepted the conclusion that the boy was stationary at the time, but accepted a conclusion of no contributory negligence even on the alternative factual basis that he was moving.

<sup>63</sup> Such a rule would seem to be inconsistent with *Sibley v Kais* (1967) 118 CLR 424, which concluded that reasonable persons should anticipate that others may not comply with the road rules.

<sup>64</sup> See also *Chapman v Post Office* [1982] RTR 165, which Goudkamp uses to support a general policy that claimants injured when in a 'protected zone' are exempt from contributory negligence: Goudkamp, 'Rethinking Contributory Negligence' (n 9) 316–17. In that case, the pedestrian was struck while standing on a footpath waiting for a bus. Again, the general policy probably does not exist and was not articulated by the Court of Appeal. Instead, Lord Denning MR merely asserted that he saw 'no reason why a person standing on a kerb is guilty of negligence at all'; no matter how far the plaintiff leant out over the roadway, the van was 'at fault and she [was] not': *Chapman* (n 64) 166. Admittedly, the second statement is ambiguous and could be a factual conclusion or reflect a more absolute rule.

<sup>65</sup> To be clear, while we acknowledge that courts have (and are in the future likely) to avoid difficult legal issues in this way, we do not support such an approach.

authority has a duty to prevent a prisoner's suicide, or a nursing home is caring for patients suffering from dementia.<sup>66</sup> As Simons notes, the duty of the defendant in such cases is to protect the plaintiff from the very thing that has occurred.<sup>67</sup> We would add that this duty rests upon the plaintiffs' diminished capacity to take care for their own safety. Such scenarios share some similarities with those in which professional duties arise. Contributory negligence rarely arises in the context of professional advice,<sup>68</sup> perhaps because clients of professionals are entitled to assume that their interests are protected to a higher standard than is ordinarily required of the clients themselves as reasonable persons safeguarding their own interests. However, professional duties (other than those that are protective in the stronger sense described above) are not the focus of the following discussion.

What is not clear in the context of protective duty relationships is whether there is any residual role for contributory negligence at all, or whether the effect of a protective duty is to preclude a defence of contributory negligence altogether. In suicide cases, for example, courts have taken differing approaches as to whether a prisoner's suicide can amount to contributory negligence,<sup>69</sup> and no clear answer to this question emerges. The *Ipp Report* is unhelpful in its treatment of the question; it merely observes that: (1) these duties are 'obviously relevant to the question of contributory negligence' in a claim against a prison authority;<sup>70</sup> and (2) where a protective duty applies, the plaintiff 'is entitled to look to the defendant for protection and, *to that extent*,

<sup>66</sup> See also *Ipp Report* (n 4) 131 [8.34].

<sup>67</sup> Simons (n 3) 39.

<sup>68</sup> See Goudkamp, 'Rethinking Contributory Negligence' (n 9) 319 and James Goudkamp and Donal Nolan, 'Contributory Negligence in the Court of Appeal: An Empirical Study' (2017) 37 *Legal Studies* 437, which identifies only a small subset of professional negligence cases out of all cases in the data set involving contributory negligence. In the medical context, see, eg, *Kite v Malycha* (1998) 71 SASR 321, 338 (Perry J). One context where contributory negligence is more readily provable is where the plaintiff has not provided the professional with all relevant information needed to give appropriate advice, or has failed to follow the advice given. In such cases, the plaintiff and defendant may have a 'shared responsibility': *Tai v Hatzistavrou* [1999] NSWCA 306, [56] (Priestley JA). Another example in the medical negligence context is *Locher v Turner* [1995] Aust Torts Reports 81-336 (Queensland Supreme Court), *affd Turner v Locher* [1995] QCA 106.

<sup>69</sup> See the differing approaches of the minority and majority judges in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (the majority supporting the application of contributory negligence where the plaintiff was of sound mind). See also n 133; *Corr* (n 7); Simons (n 3) 39 n 30 on the American courts' approach to this issue.

<sup>70</sup> *Ipp Report* (n 4) 131 [8.34]–[8.35].

is not required to take care for his or her own safety.<sup>71</sup> Confusingly, however, the *Ipp Report* denies that the plaintiff is not therefore required to take reasonable care, or that contributory negligence does not therefore apply.<sup>72</sup> The question, then, is what 'to that extent' means in this context.

Two possible meanings of this term seem likely, although neither is satisfactory. If the *Ipp Report* means merely to point out that a plaintiff is only entitled to act without reasonable care to the extent that a protective duty exists, then it is stating the obvious. Alternatively, if the *Ipp Report* means to suggest that there are circumstances *within the scope* of a protective duty in which a plaintiff is still required to take reasonable care for her own safety, then it embraces a paradox: if the scope of a notional duty does not extend to the circumstances then that duty does not arise in the first place. Even if this paradox is ignored, protective duties typically arise precisely because the plaintiff is suffering from some lack of self-protective capacity.<sup>73</sup> That being so, there are unlikely to be many circumstances in which the defendant owes a protective duty to the plaintiff, yet in which the plaintiff's failure to take reasonable care might nevertheless constitute contributory negligence.<sup>74</sup>

Supposing such circumstances can be identified, though, it is surely only possible to meaningfully assess a plaintiff's remaining responsibility to protect herself from a defendant's negligence by applying a *lower* standard of care

<sup>71</sup> Ibid 131 [8.35] (emphasis added).

<sup>72</sup> Ibid.

<sup>73</sup> In relation to the duty owed by teachers to pupils, see, eg, *Victoria v Bryar* [1970] ALR 809, 810 (Barwick CJ), approving *Richards v Victoria* [1969] VR 136. In *Richards*, Winneke CJ stated: 'The reason underlying the imposition of the duty [on school teachers] would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury': at 138. In relation to the duty owed by prison authorities to prisoners, see, eg, *New South Wales v Bujdoso* (2005) 227 CLR 1, 14 [45], quoting American Law Institute, *Restatement (Second) of Torts* (1979) § 320: 'One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him'.

<sup>74</sup> Of course, a plaintiff's failure to take reasonable care might preclude liability for certain injuries if that failure is so causally unrelated to the defendant's negligence that it constitutes an intervening act. For example, if the defendant's negligence merely 'secure[d] the presence of the plaintiff at the place where and at the time when he or she is injured' through the plaintiff's own negligence, then that negligence will fall outside the scope of the defendant's liability: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 516 (Mason CJ). However, the fact that the plaintiff's failure to take reasonable care might constitute an intervening act says nothing at all about whether a failure to take reasonable care might constitute contributory negligence.

than that of an objectively reasonable person with full capacity.<sup>75</sup> If the defendant owes a duty to protect an elderly dementia patient, for example, does the patient's residual obligation to take care for her own safety (if it exists at all) really require her to meet the standard of the reasonable person who does not suffer dementia? Aside from the obvious injustice and impracticality of this conclusion, it would require the plaintiff to conduct herself in accordance with two different standards of care in her dealings with the defendant, depending on whether the defendant's duty extends to the circumstances (which circumstances are, as explained, highly uncertain). The application of two distinct standards would undermine the protective nature of the duty owed by the plaintiff, and (in certain cases at least) might contradict the High Court's clearly stated view that — for defendants and thus, one assumes, equivalently for plaintiffs — the 'relevant standard of care is applied uniformly' in respect of the same incident.<sup>76</sup>

The *Ipp Report* also fails to explain how protective duty relationships are compatible with an equivalent standard of care applying to plaintiffs and defendants. If we are correct that any residual responsibility owed by a protected plaintiff to herself (if it exists) must nevertheless be measured against a reduced standard, this is clearly at odds with the law's repeated assertion that factors such as dementia are irrelevant to the standard of care owed by defendants.

What we can say is that if the contributory negligence defence is precluded altogether — or, alternatively, if a lower standard is applied — this must flow from the articulation of the scope of duty itself. In other words, if we articulate a defendant's duty as requiring him to protect a dementia patient from injuring herself then, as a matter of logic, the defendant cannot argue that the patient failed, carelessly, to prevent injury to herself.

### G *Summary of Scenarios in Which Setting the Standard of Care Is at Issue*

The purpose of this part was to identify the scenarios in which issues relating to setting the standard of care arise and when they do not. In summary, it has been shown that the appropriate standard of care *does not* need to be modified (and therefore no questions of law are engaged): (1) if factors that are external

<sup>75</sup> Presumably, if the scope of a protective duty is defined by specific factual circumstances (for example, whilst the plaintiff is at a particular place or engaging in an activity; say, being instructed by the defendant) then 'to the extent' means that, outside of that scope (place or activity), no protective duty arises at all.

<sup>76</sup> *Imbree* (n 56) 533 [70] (Gummow, Hayne and Kiefel JJ).

to the parties themselves (time, place and so forth) are said to bear upon what a reasonable person would have done in the circumstances; (2) if a plaintiff's personal characteristics (such as age, mental capacity and so forth) are said to bear upon what a reasonable person would do by way of a reasonable response to a risk; (3) if, as a matter of policy, the plaintiff owes no duty to take reasonable care for her own safety; or (4) if the defendant's duty extends to protecting the plaintiff from a failure to take care for her own safety.

In contrast, this part has shown that legal questions concerning the appropriate standard of care *do necessarily arise* in two contexts: (1) when it is alleged that a personal characteristic (physical or mental) affects a person's capacity to reason or that person's capacity to respond to or appreciate a risk; and (2) when it is alleged that, by virtue of the nature of the activity engaged in, the standard ought to be increased to reflect the special skills required for that activity. Part V, which follows, focuses on the first of these contexts, and critically analyses the personal characteristics that do and do not modify the standard of care as a matter of law.

## V THE LAW AS IT STANDS: PERSONAL CHARACTERISTICS THAT DO AND DO NOT MODIFY THE STANDARD OF CARE

### A *Involuntariness and Incapacity*

It is a fundamental principle of tort law that, in order for a person to be at fault, his or her conduct must be voluntary.<sup>77</sup> This principle is most commonly espoused in relation to trespass;<sup>78</sup> however, it applies equally to all fault-based torts, including negligence.<sup>79</sup> Thus, a driver who loses control of a car as a result of being stung by a bee,<sup>80</sup> or having suffered (without sufficient fore-

<sup>77</sup> Balkin and Davis (n 35) 34–5 [3.6], 118 [5.10], 829 [29.16].

<sup>78</sup> See, eg, *Public Transport Commission (NSW) v Perry* (1977) 137 CLR 107, 133–4 (Gibbs J).

<sup>79</sup> In *Slattery v Haley*, for example, Middleton J observed that a negligent act must 'have been the conscious act of the defendant's volition', and that 'when "the lunacy of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and therefore no liability": *Slattery v Haley* [1923] 3 DLR 156, 160, quoting Sir John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Sweet & Maxwell, 5<sup>th</sup> ed, 1920) 74–5. See also *Dunnage v Randall* [2016] QB 639 and the various authorities cited at 651–9 [33]–[67] (Rafferty LJ).

<sup>80</sup> *Scholz* (n 33).



warning) a heart attack,<sup>81</sup> will not be negligent, since in such cases ‘the act or conduct in question is considered not to be the act of the defendant at all’.<sup>82</sup>

The same principle applies equally to alleged acts of contributory negligence,<sup>83</sup> and, although there is no clear authority on the point, it seems logical that it must also apply to a plaintiff’s omission to avoid a risk that she is forced to confront and is physically incapable of avoiding.<sup>84</sup> Thus, for example, a disabled woman who is incapable of escaping the path of a car that has negligently mounted the pavement is no more ‘voluntary’ in her conduct than is a man who, having suffered an unexpected stroke, falls into the path of oncoming traffic. It is different, of course, if the plaintiff’s own actions create the risk (in whole or in part) that materialises, but this is because the conduct that defendants are likely to impugn in such cases is that which exposes the plaintiff to the danger in the first place (such as, for example, crossing a road on crutches without ensuring there is sufficient time to do so), as opposed to the plaintiff’s failure to take subsequent remedial action (such as, for example, growing healthy legs and running from the path of an oncoming car).<sup>85</sup>

The law is unconcerned with whether a person’s involuntariness is attributable to an external physical force (such as a bee sting), physical illness (such as a heart attack), or even a mental condition (provided the ‘condition entirely eliminates responsibility’).<sup>86</sup> In all instances, the complete absence of any will to do the impugned act negates fault entirely,<sup>87</sup> and no standard of

<sup>81</sup> *Waugh* (n 36). See also *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263 (CA) (driver with low blood sugar).

<sup>82</sup> *Carrier v Bonham* [2002] 1 Qd R 474, 486 [32] (McPherson JA), citing *Morris v Marsden* [1952] 1 All ER 925, 927–8. See also *Beals v Hayward* [1960] NZLR 131, 138; *Roberts v Ramsbottom* [1980] 1 WLR 823, 830–3.

<sup>83</sup> See especially *Corr* (n 7) 903–4 [15].

<sup>84</sup> It may be that this much is in fact implicit in McPherson JA’s reference in *Carrier* (n 82) 486 [32] to ‘act[s] and conduct’.

<sup>85</sup> See also the discussion of Example 1: Risk Taking Activities in Part IV(C).

<sup>86</sup> *Dunnage* (n 79) 666 [114] (Rafferty LJ). Vos LJ made a similar point: at 670 [131]. See also *Corr* (n 7) 909 [31] (Lord Scott), 913 [44] (Lord Walker), 914 [51] (Lord Mance), 916–19 [58]–[69] (Lord Neuberger). As Maria Orchard points out, however, proving ‘complete elimination of responsibility’ is an ‘unlikely feat’: Maria Orchard, ‘Liability in Negligence of the Mentally Ill: A Comment on *Dunnage v Randall*’ (2016) 45 *Common Law World Review* 366, 371. She also points out that this means that it makes it more likely that parties can avoid liability where they have physical illness rather than mental illness because involuntariness will be more easily established on medical evidence, despite the Court of Appeal in *Dunnage* stressing that no distinction should be drawn on that basis. See also John Fanning, ‘Mental Capacity as a Concept in Negligence: Against an Insanity Defence’ (2017) 24 *Psychiatry, Psychology and Law* 694, 699.

<sup>87</sup> Balkin and Davis (n 35) 829 [29.16].

care is owed. It is less clear, however, whether the standard of care could ever be *decreased* on the basis of some mental incapacity that falls short of rendering a person's conduct involuntary, or whether liability should otherwise be attenuated by a person's capacity to appreciate the nature of his or her conduct.<sup>88</sup> Whereas *criminal* responsibility will not arise if 'the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong';<sup>89</sup> no such allowances are typically made in tort law (or the civil law more generally).<sup>90</sup> There are at least two reasons why tort law might adopt a different approach in this respect.

The first reason is that tort law, unlike criminal law, is seldom concerned with a person's motives or intentions.<sup>91</sup> The second reason is that, when it

<sup>88</sup> In certain Canadian provinces, for example, defendant liability does not arise if the defendant lacked either the capacity to understand the nature of duty owed or the capacity to discharge that duty: see especially *Buckley v Smith Transport Ltd* [1946] 4 DLR 721, 728 (Roach JA) (Ontario Court of Appeal); *Fiala v Cechmanek* (2001) 201 DLR (4<sup>th</sup>) 680, 696–7 [49] (Wittmann JA) (Alberta Court of Appeal). For a rejection of any such allowance being made, see Fanning (n 86) 699, who argues that "capacity" is an uncertain conceptual basis on which to justify such excusal. Whether this is correct or not, we agree with Fanning that involuntariness is a valid basis for precluding liability, irrespective of the cause of that involuntary conduct. Fanning maintains that a 'defendant ... should not be in breach of his duty of care to the claimant where his mental disorder suddenly and without warning totally incapacitated him from performing a voluntary act. ... [S]udden and unexpected physical incapacitation provides an objectively justifiable basis on which to displace negligence's corrective mechanism. There is no reason why this same displacement should not occur where a defendant could not reasonably have foreseen the risk of sudden "insanity": at 706 (emphasis omitted).

<sup>89</sup> *M'Naghten's Case* (1843) 10 Cl & Fin 198, 210; 8 ER 718, 722 (Tindal CJ). The rule in *M'Naghten's Case* is enshrined, eg, in *Criminal Code Act 1899* (Qld) s 27; *Mental Health Act 2016* (Qld).

<sup>90</sup> *Carrier* (n 82) 478 [2], 480 [8] (McMurdo P). Some commentators have criticised the law's failure to take a defendant's mental illness or insanity into account in determining reasonableness: see, eg, Nikki Bromberger, 'Negligence and Inherent Unreasonableness' (2010) 32 *Sydney Law Review* 411; James Goudkamp, 'Insanity as a Tort Defence' (2011) 31 *Oxford Journal of Law Studies* 727. In particular, Bromberger argues that the law's treatment of persons with reduced mental capacity is inconsistent with its treatment of children. See also the numerous authorities cited by Fanning (n 86) 1 n 7. Fanning criticises these authorities and defends the current approach.

<sup>91</sup> See, eg, Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 86–7; Richard Buckley, 'Intentional Invasion of Land' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10<sup>th</sup> ed, 2011) 49, 50. As Denning LJ explained in *White v White* [1949] 2 All ER 339, 351, citing *DPP (UK) v Beard* [1920] AC 479, it is usually irrelevant in tort law whether a person knew that what he was doing was wrong: 'I can understand, of course, that where a specific intent is a necessary ingredient of the wrong, a man may not be responsible if he was suffering at the time from a disease which made him incapable of forming that intent ... But the cases which I have cited show that assault and trespass, to which I

comes to a defendant's conduct, strong policy reasons support the adoption of a different approach in tort law and criminal law, respectively. As Denning LJ remarked,

both on principle and authority, the effect of insanity is to be regarded differently in the civil courts from what it is in the criminal courts. ... [I]nnocent third persons may have been injured by the sufferer. ... If [the defendant] is a man of wealth or is insured, are not the injured persons to be compensated from his estate? If the matter were free from authority I would say they clearly are ... The reason is that the civil courts are concerned, not to punish him, but to give redress to the person he has injured.<sup>92</sup>

In many of the factual contexts in which negligence is litigated, these policy (distributive justice) considerations are underpinned by the existence of compulsory insurance that gives access to insured defendants. These policy considerations afford strong support for the view that mental incapacities — other than those that result in entirely involuntary conduct — should be ignored insofar as they limit the ability of defendants to conduct themselves according to the standard of reasonableness. By parity of reasoning, however, these considerations support the view that mental incapacities *should* be taken into account insofar as they limit the ability of plaintiffs to conduct themselves reasonably. Mental illness may therefore be one factor in respect of which equivalence is not, at least from one certain ideological perspective, justified. We consider this issue further in Parts VI and VII.

would add negligence, do not fall within that exception.' Howarth observes that the view 'which has enlisted the largest modern support, would hold a mentally disabled person liable who knew what he or she was doing, even if there was no understanding that the conduct was wrong': David Howarth, 'Trespass and Intentional Interference with the Person' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10<sup>th</sup> ed, 2011) 23, 30, citing *Morriss* (n 82); *Beals* (n 82); *Whaley v Cartusiano* (1990) 68 DLR (4<sup>th</sup>) 58 (Ontario Court of Appeal); *P v P* [1999] TLR 550 (CA).

<sup>92</sup> *White* (n 91) 350–1, citing: *Weaver v Ward* (1616) Hob 134; 80 ER 284; *Taggard v Innes* (1862) 12 UCCP 77; *Donaghy v Brennan* (1900) 19 NZLR 289. See also Wolff SPJ's remark in *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56, 67 that 'there is much to be said in support of the theory that a lunatic should be responsible for his tortious acts. The ancient rule of liability, based on the good of the community ... has much to commend it.' For criticisms of such views, see Wendy Bonython, 'The Standard of Care in Negligence: The Elderly Defendant with Dementia in Australia' (2011) 10(2) *Canberra Law Review* 119. At least one commentator has argued that the existence of compulsory insurance should be relevant in determining whether reduced mental capacity should be taken into account when determining a defendant's negligence: Bromberger (n 90) 429–35.

### B *A Personalised Objective Standard?*

Assuming that a person's conduct is voluntary, however, to what extent can an objective standard of care be personalised in the light of that person's characteristics before that standard ceases to be objective — that is, before it becomes subjective? Some judges would appear to take the view that it is impossible to take account of a plaintiff's personal characteristics at all, 'without introducing a subjective standard into this area of law', and that any deviation from this objective standard (accommodating, for example, intoxication or defective hearing or sight) is therefore an exception to the rule.<sup>93</sup> In our view, however, provided that (1) the person whose conduct is in question possesses the capacity to act reasonably,<sup>94</sup> and (2) the question of whether that person's conduct was in fact reasonable can be answered by reference to some measurable criteria to which the reasonable person can relate (such as mental age or physical mobility), then the test is still at its core an objective one. Put differently, the standard only becomes subjective if we ask the reasonable person to depart from the underlying standard of 'reasonableness'. It follows that there is nothing illogical about asking, for example, 'what would a reasonable person with the mental capacity of a 5-year-old do?'<sup>95</sup> Assuming that appropriate measures can be identified and applied,<sup>96</sup> the question remains as to when, as a matter of law, courts ought to do so. It is to this question that we now turn.

#### 1 *Age*

Some personal factors have, without controversy, been accepted as modifying standards of care, and the assumption is that the modification applies equiva-

<sup>93</sup> *Joslyn* (n 2) 567 [39] (McHugh J).

<sup>94</sup> As Gardner, 'The Many Faces of the Reasonable Person' (n 19) 579 puts it, '[s]ome people, or some people at some times, are incapable of being reasonable. They suffer from severe mental illness, or are in the grip of hallucinogenic drugs, or have worked themselves up into a wild state. If the law attempts to endow the reasonable person with these personal characteristics in the name of compassion, then it ends up demanding that people be judged by the standard of an unreasonable reasonable person, which makes no sense.'

<sup>95</sup> Perhaps even a question such as 'what would a reasonable person do if he or she were incapable of appreciating certain risks' might be capable of being answered objectively.

<sup>96</sup> Of course, whether expert evidence is capable of providing appropriate measures against which to make such judgments is another matter entirely. It may be difficult if not impossible, for example, to identify objectively measurable criteria against which to judge the conduct of a person who suffers from schizophrenia. But these are technical and evidentiary matters that are beyond the scope of this article.

lently to both defendants and plaintiffs. Young age is one such factor.<sup>97</sup> Age typically favours plaintiffs, of course; particularly in motor vehicle accidents (since children are seldom drivers). However, young age can also reduce the standard of care expected of defendants. This much was made clear by the High Court in *McHale v Watson*,<sup>98</sup> and the accuracy of that judgment has never seriously been doubted.<sup>99</sup>

It is debatable whether it is strictly always *necessary* to adjust the standard of care for age, or whether it is possible, as considered in Part IV, to take age (and, perhaps, inexperience) into account as a ‘circumstance’.<sup>100</sup> In our view, however, and as we have explained, age (and inexperience) bears upon a person’s *capacity* to attain the objective standard of the reasonable person, and any departure from this objective standard must be justified as a matter of law.

It is unclear whether the standard of care can also be decreased on the basis of *old* age. In *Daly v Liverpool Corporation*, Stable J expressed the view that old age should be taken into account:

I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk. One must take people as one finds them.<sup>101</sup>

However, Stable J did not regard old age as a qualification to an objective standard of care; on the contrary, he clearly thought that the standard of care should be subjective.<sup>102</sup> In *Joslyn v Berryman*, McHugh J accepted that ‘[i]t may be the law that, in the case of an aged plaintiff, the standard of care is also

<sup>97</sup> See, eg, *Doubleday v Kelly* [2005] NSWCA 151, [26] (Bryson JA).

<sup>98</sup> *McHale* (n 2).

<sup>99</sup> *Joslyn* (n 2) 565 [34] (McHugh J); *Allen* (n 39) 360 [26] (Kourakis CJ). In *Allen*, Kourakis CJ describes age as the ‘single ... solitary exception which emphasises the rigor of the rule’.

<sup>100</sup> This was suggested in the American case of *Charbonneau v MacRury*, 153 A 457, 462–3 (NH, 1931), quoted in *McHale* (n 2) 208–9 (McTiernan ACJ). All the judges in *McHale* rejected that approach: at 209–10 (McTiernan ACJ), 213–14 (Kitto J), 221–2 (Menzies J), 229–30 (Owen J).

<sup>101</sup> *Daly* (n 1) 143.

<sup>102</sup> *Ibid.* His Honour’s example may also traverse the distinction outlined in Part IV between (1) factors that bear upon a person’s capacity to appreciate and respond to risks (which, if relevant, would involve a modification to the standard) and (2) factors that might be said to form part of the factual decision-making matrix (and which need not involve any modification to the standard of care).

tailored to the age of the plaintiff.<sup>103</sup> However, there are dicta to the effect that old age is not taken into account in determining the standard of care expected of a plaintiff,<sup>104</sup> and this view has been consistently applied in the context of motor vehicle accidents caused by the plaintiff's driving.<sup>105</sup>

Certainly, sound reasons exist to distinguish between young age and old age. For one thing, whereas a person's young age can be described as a 'characteristic of humanity at his [or her] stage of development'<sup>106</sup> (what can be expected from a child of the plaintiff's age?), it seems unlikely that any broadly inclusive 'stages of decline or infirmity' can be identified through which all humankind must pass (that is, to identify objectively measurable criteria); some 80-year-olds are unable to walk or talk, while others run marathons or perform rock music in front of packed concert halls.<sup>107</sup> Nonetheless, we consider that old age *should* be relevant in assessing the standard of care of an elderly plaintiff, for the reasons explained in Part VI.

## 2 *Inexperience*

What, then, of inexperience? On this issue the law seems clear; inexperience not borne of young age does not decrease the standard of care owed by plaintiffs and defendants alike.<sup>108</sup> Various reasons have been offered in support of this position, including the perceived practical difficulty of: (1) measuring inexperience; and (2) applying a different standard of care to persons who are aware of that inexperience and those who are not.<sup>109</sup> Here is

<sup>103</sup> *Joslyn* (n 2) 564 [32].

<sup>104</sup> See *Hodder* (n 21) 452 [298] (McLure P), 465 [345] (Murphy JA); *Allen* (n 39) 360 [26] (Kourakis CJ).

<sup>105</sup> As we noted in Part IV(E), however, the standard of care may be dictated by the nature of the activity undertaken by a party (such as driving) and the standard demanded may trump old, and even young, age. In the context of driving, see, eg, *Nettleship v Weston* [1971] 2 QB 691, 699 (Denning MR), 703 (Salmon LJ); *Roberts* (n 82) 829–30; *McKee v McCoy* (2001) 9 CCLT (3d) 294.

<sup>106</sup> *McHale* (n 2) 213 (Kitto J).

<sup>107</sup> A more practical difficulty is that triers of fact (reasonable persons) cannot draw on their own experience of old age as they can young age.

<sup>108</sup> *Imbree* (n 56).

<sup>109</sup> *Ibid* 529 [56]–[57], 532–3 [69]–[70]. This difficulty in application only applies in certain scenarios, of course, such as when the person in question is driving and might therefore owe a different standard to passengers, who know of that person's inexperience, and pedestrians, who do not. However, as Gummow, Hayne and Kiefel JJ acknowledged, this problem would not arise if, for example, 'a person deliberately agrees to allow a blacksmith to mend his watch, [in which case] it may well be said that he agrees to accept a low standard of skill': at 537 [84], quoting *Insurance Commissioner v Joyce* (1948) 77 CLR 39, 46 (Latham CJ).

not the place to engage in a detailed critique of these arguments; whether they are accepted or rejected, the law applies equivalently to plaintiffs and defendants. However, we make two brief observations about the law's treatment of inexperience. The first is that it seems odd to take young (and possibly old) age into account, yet to exclude inexperience from the standard of care entirely. Inexperience at any activity in life, or in dealing with a risk (as, for example, many new employees must), is equally a stage through which reasonable people pass, and the assumption that inexperience in these scenarios cannot be measured remains untested. The second observation is that the law may in fact take inexperience into account in certain instances, such as when a defendant owes a duty to protect or safeguard the plaintiff against the risks flowing from that plaintiff's inexperience. Consider, for example, a learner driver injured as a result of a professional driving instructor's failure to prevent that injury. Would a court assessing the learner's contributory negligence really require her to have met the standard of a competent, licensed driver, even though the instructor negligently failed to safeguard against the very consequences of the learner's inexperience in the first place? We doubt that it would.

## VI SHOULD THE STANDARD OF CARE BE APPLIED EQUIVALENTLY?

### A *Circumstances in Which Equivalence Is Problematic*

The preceding analysis demonstrates that, in many scenarios, courts simply do not need to consider the legal question of whether the standard of care should be modified by a plaintiff's personal characteristics. Nor, consequently, do the courts need to confront the issue of whether any such modification is justifiable on the basis that it applies equivalently to defendants. There are nevertheless various scenarios in which one or both of these questions do arise. This section considers whether or not the standard of care should be applied equivalently as between defendants and plaintiffs. We begin our discussion by reference to the following hypothetical scenarios.

#### *Example 2: Pedestrian on Footpath*

P, who has one leg, is walking along a footpath. D, a negligent driver, mounts the footpath with his car and travels at speed toward P. P sees the car but, due to her disability, cannot move out of the car's way as quickly as an able-bodied pedestrian would be able to.

*Example 3: Disabled Diver*

P, who has very poor vision and an intellectual disability, dives into the shallow end of a pool from a diving block that D has negligently placed at that end. P hits her head on the bottom of the pool.

Example 2 can be quickly disposed of. Assuming that P had time to evaluate the danger, but is nonetheless physically incapable of responding to it, then P's capacity to safeguard herself is entirely lacking. P is not acting, or omitting to act, voluntarily at all. Consistently with our earlier conclusions on the need for some minimal capacity to voluntarily engage in conduct, issues of contributory negligence do not arise. Scenarios such as Example 3 are more problematic, however. Although P has put herself in some danger by diving, she did not endanger anyone else in so doing, and that danger only arose because of the risk presented by D.<sup>110</sup> Here, P's physical disability *limits* her capacity to avoid the risk of harm, and this example highlights most sharply the problem of applying equivalence. This is evident in the various conflicting conclusions that courts have reached: some authorities suggest that factors such as disability are not relevant in assessing a defendant's liability and therefore, equivalently, a plaintiff's contributory negligence; however, other authorities suggest that disability can and should be relevant to assessing a plaintiff's negligence. There are three ways in which the law could resolve this problem:

- 1 A plaintiff's disability could be deemed relevant and the same standard applied equivalently to defendants, such that a defendant's disability is also relevant in assessing breach and liability (equivalence is maintained).
- 2 A plaintiff's disability could be deemed irrelevant and the same conclusion reached for defendants (equivalence is maintained).
- 3 A plaintiff's disability could be deemed relevant but the same conclusion rejected for defendants (equivalence is rejected).

Standing in the way of the third option, however, and presumably therefore also the first, is the obiter statement of McHugh J in *Joslyn v Berryman*, endorsed by the High Court in *Allen v Chadwick*:

<sup>110</sup> Further, where a plaintiff has merely omitted to safeguard himself or herself from dangers created by a defendant, the scenario may be quite different to positive conduct that endangers. One can compare such an omission with the case of a defendant's liability for a pure omission, where there is some support for the view that a defendant landowner, who has a positive duty to safeguard neighbours against a danger caused by outside events, may appeal to subjective factors that lower the standard of care: see, eg, *Goldman v Hargrave* (1966) 115 CLR 458 (PC).



A pedestrian or driver who enters a railway crossing in the face of an oncoming train cannot escape a finding of contributory negligence because he or she was not, but should have been, aware of the train. Nor does it make any difference that the pedestrian or driver had defective hearing or sight. Contributory negligence is independent of ‘the idiosyncrasies of the particular person whose conduct is in question.’<sup>111</sup>

One explanation of McHugh J’s example could be that the only alleged negligence of the disabled driver or pedestrian is the decision to enter the rail crossing (thereby endangering themselves and creating a new risk) — as opposed to failing to move in time from an oncoming train (responding to a risk created by the defendant) — and that this decision ought to have been made by the plaintiff while taking cognisance of their own disability. As such, they should have proceeded with extra caution (to compensate for their disability). On this interpretation, McHugh J would be treating disability as merely a circumstance that a reasonable person, who happens to be disabled, negligently failed to compensate for before acting. Of course, McHugh J made no such qualifications and the comment has not been interpreted so narrowly.<sup>112</sup> We therefore proceed on the basis that McHugh J was taking a more absolute approach, which rejects the view that physical disability could ever modify a plaintiff’s standard of care.

### B Normative Arguments against Equivalence

As we noted at the outset of this article, one of the key factors that differentiates a plaintiff’s negligence from that of a defendant is that there is a considerable difference, normatively, between duties owed to others and the ‘duty’ to oneself. When considering a plaintiff, we therefore need to further distinguish between (1) a plaintiff who endangers others (and herself), and (2) a plaintiff who endangers only herself.<sup>113</sup> As Simons argues, equivalence seems justified

<sup>111</sup> *Joslyn* (n 2) 567 [39], quoting *Glasgow Corporation v Muir* [1943] AC 448, 457 (Lord Macmillan), endorsed in doing so by *Allen v Chadwick* (2015) 256 CLR 148, 164 [52].

<sup>112</sup> See, eg, *Hodder* (n 21) 450–1 [284]–[292] (McLure P).

<sup>113</sup> Robert Stevens makes a similar point, although he appears to take the view that, in assessing a plaintiff’s ‘contributory fault’ (as he prefers to call it), courts are only ever ‘concerned with the foreseeable risk to himself that he created’ — that is, Stevens does not accept or acknowledge that a plaintiff’s conduct might also endanger others: Robert Stevens, ‘Should Contributory Fault Be Analogue or Digital?’ in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 247, 258. Within the second category identified, there may also be a difference between a plaintiff who endangers herself, eg, by crossing the road, and who is injured by the negligent act of the defendant

in the first scenario (such as where two drivers both negligently fail to keep a lookout, thereby colliding), but not in the second. In particular, Simons argues that plaintiffs who pose risks mainly to themselves engage in a less serious type of fault than plaintiffs who pose risks mainly to others.<sup>114</sup> Only the latter type of plaintiff should be judged by standards equivalent to those of defendants. In Simons's view, a tort victim who endangers only herself merely 'forfeits the right to the full remedy that [she] would otherwise be entitled to'.<sup>115</sup> He persuasively rejects any arguments to the effect that this forfeiture rule is a 'duty' that is morally equivalent to that owed by a defendant. Indeed, arguably there is no moral question raised at all by self-endangering conduct. As Simons states,

[w]hen the risks and benefits are located in one individual, it is normally morally permissible for that individual to choose how to weigh their relative value and thus whether or not to risk self-injury for the sake of something else.<sup>116</sup>

Goudkamp has similarly argued against the transference of standards of care from a defendant to a plaintiff, not only because (as already noted) exposing others to risk is a very different sort of behaviour to creating risks to oneself, but also because a failure to take care of oneself can arise without any duty being breached to others and often 'by way of a pure omission'.<sup>117</sup>

We agree with Simons and Goudkamp. The fault of a pedestrian who jay-walks to get to her destination more quickly is not comparable to that of a driver who drives too fast to get to his.<sup>118</sup> The injustice of treating both equivalently becomes all the more evident if the pedestrian is infirm, elderly or physically disabled.<sup>119</sup>

driver, and a plaintiff who endangers herself, but seeks to impose a duty of protection on others for their omission to warn her or prevent the danger: eg, a diver who argues the defendant failed to warn her of the shallow depth.

<sup>114</sup> Simons (n 3) 65. Cf *Smith v Zhang* (2012) 60 MVR 525, 530–3 [19]–[33] (Meagher JA).

<sup>115</sup> Simons (n 3) 53 (emphasis omitted).

<sup>116</sup> *Ibid* 51; see generally at 44–58. See also Stevens (n 113) 258, who states that '[t]he law (rightly) takes the view at the stage of establishing wrongdoing that we are allowed to be as reckless as we like with regard to our own interests'.

<sup>117</sup> Goudkamp, 'Rethinking Contributory Negligence' (n 9) 326.

<sup>118</sup> Simons (n 3) 56. Of course, we accept that in some circumstances, a pedestrian may well endanger a driver, as cases such as *Carrier* (n 82) and *Carmarthenshire County Council v Lewis* [1955] AC 549 demonstrate.

<sup>119</sup> Cf *Haley v London Electricity Board* [1965] AC 778, in which there was no suggestion or plea that the blind pedestrian was contributorily negligent when walking along the footpath, in failing to detect an obstacle: see at 806 (Lord Hodson).

### C Differing Approaches in the Courts on Disability

It is in contexts such as these that some judges have decried an approach that ignores the plaintiff's actual physical capacities. In a case arising after the civil liability statutes, *Hodder*, the facts of which form the basis for Example 3, Martin CJ engaged in a comprehensive and persuasive survey of the case law and held that physical disability *was* a relevant factor to be taken into account in determining the contributory negligence of a severely physically and intellectually disabled plaintiff who dived into the shallow end of a public swimming pool using diving blocks that had been negligently placed there by the defendant council.<sup>120</sup> The plaintiff had very limited vision and would not have been able to see the depth of the pool. As Martin CJ stressed, it is an established principle that tortfeasors must take their victims as they find them, including their weaknesses and idiosyncrasies.<sup>121</sup> His Honour noted that the trial judge had felt obliged to assess the plaintiff's carelessness without regard to his disabilities, and therefore

assessed the issues associated with the claim of contributory negligence on the basis that Mr Hodder was a normal able-bodied 23-year-old man, with normal hearing and vision, and of normal intellectual ability. The harshness, injustice and unfairness in this approach is manifest. It assumes a miracle of biblical proportions and requires the court to assess the question of contributory negligence in some parallel universe in which the blind can see, the deaf can hear, the lame can walk or even run, and the cognitively impaired are somehow restored to full functionality.<sup>122</sup>

Martin CJ concluded that the obiter views of McHugh J in *Joslyn v Berryman* are not consistent with other authorities.<sup>123</sup> His Honour also analysed the *Ipp Report* recommendations that formed the basis of *Civil Liability Act 2002* (WA) s 5K and the case law on other states' equivalent sections, and concluded that these did not preclude taking physical disabilities of a plaintiff into account in assessing the reasonableness of his or her conduct.<sup>124</sup> Specifically, the language of a reasonable person in the 'position of the plaintiff' meant that plaintiffs' reasoned choices to take care could take into account their physical

<sup>120</sup> *Hodder* (n 21) 419–45 [155]–[259].

<sup>121</sup> *Ibid* 421 [158].

<sup>122</sup> *Ibid* 420 [156].

<sup>123</sup> *Ibid* 426–32 [179]–[206].

<sup>124</sup> *Ibid* 432–45 [208]–[258].

defects.<sup>125</sup> However, Martin CJ left open the question of whether intellectual disability could be taken into account, noting that, since reasonableness required an objective standard of decision-making and cognition, this question was more problematic.<sup>126</sup>

McLure P also comprehensively surveyed the issues, but disagreed with Martin CJ's conclusion that the court could take into account the plaintiff's physical disability.<sup>127</sup> Nonetheless, and perhaps unpersuasively in light of that conclusion, McLure P agreed with Martin CJ that there was no contributory negligence on the part of the plaintiff.<sup>128</sup> Murphy JA dissented, and would have upheld the trial judge's assessment of 10% contributory negligence on the part of the plaintiff, but his Honour also agreed with McLure P that the plaintiff's physical disability should not be taken into account.<sup>129</sup>

Courts in other cases have gone further than Martin CJ did in *Hodder*. In *Goldsmith v Bisset [No 3]*, for example, the plaintiff was struck by a motor vehicle when riding her pushbike.<sup>130</sup> She was nine years old but suffered from developmental delay and had the intellectual capacity of a much younger child such that she was 'likely to be as forgetful as a 5-year-old'.<sup>131</sup> In determining whether she had been contributorily negligent in failing to stop and look before crossing the road, the Court asked whether a five-year-old child

<sup>125</sup> Ibid 439 [232].

<sup>126</sup> Ibid 437–8 [224]–[226].

<sup>127</sup> Ibid 452 [298].

<sup>128</sup> Ibid 453 [303]. It is difficult to see how McLure P could have been applying an objective standard that ignored the plaintiff's disability, and yet concluded that no contributory negligence arose: even accepting that a protective duty existed as between the defendant and plaintiff, such duty, in theory at least, would not have absolved the plaintiff completely from any 'duty' to safeguard himself, and therefore an assessment of the plaintiff's negligence, based on objective standards, would surely be that reasonable 23-year-olds do not dive into the shallow ends of pools without checking the depths, even when diving blocks have been placed on those ends. See also *Smith* (n 114) 531 [22] (Meagher JA) (plaintiff's age, poor eye sight and infirmities relevant in assessing her contributory negligence as a pedestrian crossing the road), albeit seemingly misapplying McHugh J's statement in *Joslyn* (n 2) 564–5 [32]–[34].

<sup>129</sup> *Hodder* (n 21), 453–4 [304], 474–5 [384]–[389].

<sup>130</sup> (2015) 71 MVR 53. Cf *Russell v Rail Infrastructure Corporation* [2007] NSWSC 402, in a judgment of Bell J prior to her elevation to the High Court, in which a 21-year-old woman with a mild intellectual disability entered a railway line through a missing panel in the fence and jumped aboard a slow moving goods train. She fell and was dragged along by the train. Bell J held that the plaintiff's disability was relevant in assessing her contributory negligence: at [96]. The case arose prior to the operation of the civil liability statutes.

<sup>131</sup> See *Goldsmith* (n 130) 58 [8], 83 [137].

could be expected to do so.<sup>132</sup> This approach appears to be inconsistent with that of McLure P and Murphy JA in *Hodder*.

#### D *Can We Apply Disability Equivalently to Defendants?*

It follows from the civil liability statutes, and their demand that an equivalent standard of care applies, that the law cannot modify that standard by reference to a plaintiff's disability, unless that modification could equally be made to the standard owed by a disabled defendant. It is doubtful whether the courts would apply the same, lower standard equivalently to defendants.<sup>133</sup> One way to test whether *Hodder* and Martin CJ's approach are consistent with equivalence is to compare the plaintiff in Mr Hodder's position with a defendant in near-identical circumstances who, rather than injuring himself, injures another. For example, if Mr Hodder had dived into the pool, without compensating for his very poor eyesight with further checks, and had hit another swimmer in the pool, causing her injury, would the law make allowances for his lack of 'normal' vision? It is doubtful that the law would do so,<sup>134</sup> having due regard to the fundamental normative distinction, outlined above, between

<sup>132</sup> *Ibid* 83 [137].

<sup>133</sup> Conflicting views were expressed in this regard in *Corr* (n 7). In that case it was argued, among other things, that Mr Corr was contributorily negligent in jumping to his death from a multistorey carpark. Lord Scott compared Mr Corr's conduct with that of a hypothetical defendant in his position: 'Suppose, for example, that there had been people in the area on to which Mr Corr was likely to land if he jumped. If he had jumped in those circumstances and had in the process injured someone beneath, surely no court, faced with a claim by the injured person for damages, would have found any difficulty in attributing fault to his action': at 909 [31]. For this reason, Lord Scott would have applied equivalence and reduced the plaintiff's damages by 20%: at 909–10 [32]. Lord Neuberger would also have applied some reduction in damages, in theory at least, but considered it inappropriate to do so given the matter was hardly touched on in evidence and argument below: at 918–19 [67]–[70]. Lord Mance reached the same conclusion as Lord Neuberger, and agreed that Mr Corr was at fault, but opined that 'this may not, I believe, by itself be conclusive on the issue whether such a person should bear part of any loss flowing from suicide or an attempt as against a person responsible causally for the depression leading to the suicide or attempt': at 914–15 [51]. Lords Bingham, at 906 [22], and Walker, at 913 [44], did not believe any reduction in damages was justifiable in the case. Leaving aside Lord Scott's judgment, it is not clear, however, whether their Lordships' approaches were concerned with the apportionment stage of the enquiry (as to which, see our discussion in Part VII and in particular n 153 onwards) or whether their lordships were applying standards of care that differed as a result of, and depending on the degree of, the plaintiff's mental illness. The former interpretation is more consistent with orthodoxy.

<sup>134</sup> See *ibid* 909 [31] (Lord Scott).

a plaintiff whose conduct endangers others, and a plaintiff whose conduct merely endangers herself.

#### E *Non-Equivalent Standards in the Employment Context*

One further example where, at least historically, the courts appear to have taken a non-equivalent approach, is the body of cases dealing with the contributory negligence of absent-minded or distracted employees. Many cases in that context have suggested that inadvertence brought about by, for example, carrying out repetitious work, may not amount to an unreasonable 'response' to risks,<sup>135</sup> notwithstanding that similar inadvertence outside the employment context would be unreasonable. One of the difficulties created by the *Ipp Report* is that it does not indicate how equivalence will work in practice and whether such established modifications to the standard of care are still good law. The report does make the rather obvious point that applying the same standard of care to a plaintiff and defendant does not mean that the factual question of what is reasonable conduct for the defendant, as tortfeasor, is identical to that of what is reasonable conduct for the plaintiff, as victim, in the context of their interaction leading to the plaintiff's damage.<sup>136</sup> As the report notes, applying the same standard 'does not entail ignoring the identity of the plaintiff or the nature of the relationship between the plaintiff and defendant'.<sup>137</sup> In the employment context, the report states that the court would still need to take into account the fact that the defendant 'was in the better position to avoid the harm'.<sup>138</sup> It continues, however, by stating that this does not mean that such a plaintiff does not have the 'ability, relative to that of the inflictor of the harm, to take precautions to avoid it'.<sup>139</sup>

The real issue, however, is whether an employee who has an expectation that the employer will use its better position to ensure a safe work environment may be able to justify engaging in seemingly unreasonable conduct on that basis, qua plaintiff, in circumstances where the same standard would not apply to that employee acting in identical circumstances who causes injury to

<sup>135</sup> See, eg, *McLean v Tedman* (1984) 155 CLR 306; *Czatyрко v Edith Cowan University* (2005) 214 ALR 349.

<sup>136</sup> *Ipp Report* (n 4) 123–4 [8.12].

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid* 124 [8.12].

<sup>139</sup> *Ibid.* It is not clear what the concept of relativity means or adds in this statement, seemingly being relevant to apportionment of damage rather than whether a plaintiff (or defendant) has breached the (same) standard of care.

another. One would assume not. Suppose, for example, that the plaintiff, a forklift driver, is injured at work as a result of both her inadvertence and an unsafe work system. The law (prior to the *Ipp Report*) may well have concluded that she was not contributorily negligent. But if the plaintiff injured another worker or visitor to the premises in nearly identical circumstances, so that her conduct was judged qua defendant,<sup>140</sup> it is highly unlikely that ‘mere inadvertence’ would ever be an excuse. In other words, the plaintiff would be found negligent. If the case law on mere inadvertence survives the Ipp reforms, and early indications are that it has,<sup>141</sup> then the courts are not applying equivalent standards.<sup>142</sup> Whether this is because of the existence of a protective duty relationship, or otherwise, is a question that the courts have yet to answer.

#### F Means by Which Courts Circumvent Equivalence

For reasons such as those outlined in this part, courts are reluctant to impose equivalence. Given that the law clearly mandates equivalence, however, how might a court avoid it? At least five techniques exist by which a court *might* give effect to non-equivalent standards of care (the first four of which are revealed in the preceding analysis):

- 1 The factual conclusion that the plaintiff was not negligent may reflect an underlying lower standard, without being articulated. *Chapman v Post Office*<sup>143</sup> and *Keam*<sup>144</sup> may be two examples. In other words, a court may assert that there was no negligence, but without any real analysis or explanation.
- 2 A factor might be taken into account and included ‘in the circumstances’. For example, the circumstances might incorporate personal characteristics that might not generally be included for defendants. Alternatively, a court might simply state that the factor is a relevant consideration and ignore the

<sup>140</sup> See *Boral Bricks Pty Ltd v Cosmidis [No 2]* (2014) 86 NSWLR 393 (‘*Cosmidis*’).

<sup>141</sup> See, eg, *Waco Kwikform Ltd v Perigo* [2014] NSWCA 140 (one aspect of alleged contributory negligence not made out against scaffolder who fell from height while dismantling scaffolds as it arose ‘due to a lapse of attention’: at [84]); *Woolworths Ltd v Grimshaw* [2016] QCA 274 (plaintiff injured by slipping on a grape at the supermarket where she worked).

<sup>142</sup> See *Simons* (n 3) 38, who views the inattentiveness in employment cases as an example of non-symmetrical standards being applied.

<sup>143</sup> *Chapman* (n 64).

<sup>144</sup> *Keam* (n 61).

fact that this is inconsistent with conclusions reached by courts in the context of defendants.<sup>145</sup>

- 3 Contributory negligence might be precluded for reasons of policy.
- 4 A protective duty relationship might be identified between the defendant and the plaintiff, which duty eliminates or reduces the plaintiff's obligation to safeguard her own interest.
- 5 A different standard might be applied at the apportionment stage.<sup>146</sup>

Undeniably, some judges are giving effect to the sort of normative arguments made by Martin CJ and Simons without expressly rejecting equivalence. It is also important to appreciate that, if courts *do* reduce standards of care because a plaintiff is merely endangering herself and not others, then this occurs irrespective of the particular characteristics of the plaintiff: the only difference is that, where a plaintiff is elderly, disabled, or otherwise unable to meet the objective standard, the courts are able to crystallise the lower standard by reference to those characteristics. Moreover, although the civil liability statutes demand that the courts apply the same process of analysis and the calculus of negligence factors to determining contributory negligence as to negligence, applying those factors does not prevent courts engaging in the first two techniques identified, since these are purely factual processes that do not, on their face, involve any engagement with the legal matter of setting of the standard.

#### VII DOES EQUIVALENCE HAVE ANY ROLE AT THE APPORTIONMENT STAGE OF CONTRIBUTORY NEGLIGENCE?

There is one further critical step that is necessary in determining the consequence of a plaintiff's contributory negligence, namely that of apportionment. In Australian jurisdictions, this process is governed by separate legislative provisions,<sup>147</sup> which require a reduction in damages (apportionment) 'to such

<sup>145</sup> This is what Martin CJ in *Hodder* seemed to suggest he was doing, but we are not persuaded. It appears to us that he was really modifying the standard of care, rather than applying it only to the factual circumstance.

<sup>146</sup> See Part VII.

<sup>147</sup> In most states, these are contained in different statutes to the civil liability statutes: *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 9; *Law Reform Act 1995* (Qld) s 10; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 7; *Wrongs Act 1954* (Tas) s 4; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) s 4. Cf *Wrongs Act 1958* (Vic) s 26.



extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.<sup>148</sup> As Simons points out, this means that, in the US context where jury trials are still widespread, even if the law were notionally to demand an equivalent standard of care of plaintiffs as for defendants, juries remain free to exercise their discretion in a way that reflects value judgments such as those explored above (for example, that victim self-endangerment is not as culpable as defendant breach of duty). Indeed, the US *Restatement (Third) of Torts* states that fact-finders can expressly take these differing circumstances into account in apportioning: 'Thus, there is not much need to have rules of law impose a different standard on plaintiffs and defendants.'<sup>149</sup> So much for the law!

In Australia, nothing in the civil liability statutes that have incorporated the Ipp reforms, nor in the *Ipp Report* itself, expressly impacts on the apportionment regime. However, since nearly all apportionment decisions are made by judges (and not juries),<sup>150</sup> in some cases judges do give reasons explaining their apportionment percentages. Consequently, some 'rules' — if it is appropriate to describe them as such — have developed. In *Pennington v Norris*, for example, the High Court noted that the relative 'culpability' of the parties' conduct — that is, the 'degree of departure from the standard of care of the reasonable man' — is relevant in assessing the plaintiff's share in the responsibility.<sup>151</sup> Courts in numerous subsequent cases have emphasised the greater capacity of a motorist to cause damage than a pedestrian, and have allocated greater responsibility, all other things being equal, to a defendant driver in such circumstances (such as, for example, where both driver and pedestrian have failed to keep a proper lookout).<sup>152</sup>

A plaintiff's mental condition might also be taken into account in apportioning damages. In *Corr v IBC Vehicles Ltd*, Lord Neuberger called for a 'nuanced approach' to the treatment of mental illness as it bears upon apportionment, which recognises that 'there are degrees to which a person has control over, or even appreciation of the effect and consequences of, his

<sup>148</sup> See, eg, *Wrongs Act 1958* (Vic) s 26(1)(b).

<sup>149</sup> American Law Institute, *Restatement (Third) of Torts: Apportionment of Liability* (2000) § 3 reporters note to cmt (a), cited in Simons (n 3) 65 n 100.

<sup>150</sup> The exception is Victoria, in which jury trials are more common. Recent examples of contributory negligence assessments made by juries are *Willett v Victoria* (2013) 42 VR 571 and *Cook v Karden Disability Support Foundation* [2016] VSCA 263.

<sup>151</sup> (1956) 96 CLR 10, 16.

<sup>152</sup> See, eg, *Anikin v Sierra* (2004) 211 ALR 621, 631 [46].

acts.<sup>153</sup> Although his Lordship did not directly address the issue, it seems doubtful that a *defendant's* mental condition would ever be taken into account to reduce his share in damages.<sup>154</sup>

The question arises, then, whether the civil liability statutes mandate a different approach. The issue has been the subject of conflicting decisions in the NSW Court of Appeal. On one view, the passage of *Civil Liability Act 2002* (NSW) s 5R, which demands equivalence, does not change the approach to apportionment of responsibility according to what is 'just and equitable' under the apportionment legislation. On this view, the established authorities still stand.<sup>155</sup> However, NSW Court of Appeal judges forming majorities in a number of recent cases have held that this approach is no longer valid given the legislature's clear insistence that plaintiffs and defendants be treated equally. For example, in *Boral Bricks Pty Ltd v Cosmidis [No 2]*, a case concerning a pedestrian struck by a forklift, Basten JA (Emmett JA agreeing, McColl JA dissenting) held that s 5R now mandates that

no distinction is made between the fact that from one perspective the driver is in control of a vehicle that could cause serious harm to a pedestrian, whilst from the perspective of the pedestrian, it was the likelihood of serious harm which was to be considered. If the plaintiff were aware, or ought to have been aware, of the presence of a large forklift operating in the area and if the forklift driver were aware, or should have been aware, of the likely presence of pedestrians, and if each were equally careless, liability should be shared equally.<sup>156</sup>

Basten JA considered that a purposive approach to interpreting the statute supported that conclusion.<sup>157</sup> He gleaned that purpose from the *Ipp Report*, which noted that lower courts took a 'more indulgent' approach to assessing plaintiff's carelessness and that 'this approach should not be supported'.<sup>158</sup> A

<sup>153</sup> *Corr* (n 7) 917–18 [63]–[64]. It should be noted, however, that it is not entirely clear whether Lord Neuberger was considering the plaintiff's mental state at the apportionment stage or, alternatively, applying a variable standard of care according to where on the spectrum of sanity or normalcy the plaintiff fell. After reviewing authorities including *Corr*, Rafferty LJ in *Dunnage* appears to have adopted the latter approach to analysis: *Dunnage* (n 79) 666 [114].

<sup>154</sup> Cf *Corr* (n 7) 909 [31] (Lord Scott), noting that if the plaintiff had injured someone whilst committing suicide, his mental illness would not have precluded a finding of fault.

<sup>155</sup> See *Smith* (n 114) 529 [13]–[16] (Macfarlan JA), 532 [29] (Meagher JA); *Marien v Gardiner* (2013) 66 MVR 1, 13 [49], 14 [56], all applying: *Pennington* (n 151); *Anikin* (n 152).

<sup>156</sup> *Cosmidis* (n 140) 416 [99].

<sup>157</sup> *Ibid* 416 [100].

<sup>158</sup> *Ipp Report* (n 4) 123 [8.11], quoted in *ibid* 415 [96].

similar majority view was expressed in *T & X Co Pty Ltd v Chivas*.<sup>159</sup> Beazley P, in dissent in that case, reiterated that drivers should bear a greater proportion of blame where driver and pedestrian were otherwise equally careless.<sup>160</sup>

Of course, if the dissenting view is correct, then the effect of the equivalence provisions is greatly diminished, since a plaintiff's 'share in the responsibility' may be all but erased notwithstanding the conclusion that she is contributorily negligent. Nevertheless, we believe that the dissenting view is to be preferred, for two reasons in particular. The first is that the equivalence provisions (including s 5R) simply do not deal with apportionment, which is governed by separate provisions.<sup>161</sup> As McColl JA stated in her dissenting judgment in *Cosmidis*, s 5R 'says nothing about how, if [contributory negligence] is determined by a finding adverse to a plaintiff, the relative culpability of the plaintiff and defendant are determined'.<sup>162</sup> Thus, in her Honour's view, the earlier High Court authorities still apply.<sup>163</sup> Secondly, the majority view in *Cosmidis* and *Chivas* involves a departure from those earlier authorities — which authorities were established on the presumption that there is equivalence at common law in any case — in circumstances where the statutory language neither dictates such a change nor reflects in clear terms the views expressed in the *Ipp Report*. Basten JA probably conceded as much in *Cosmidis*, when he stated that, as a result of s 5R, 'one could approach the matter differently' to that in which it was approached in the earlier authorities.<sup>164</sup>

The issue remains unresolved.<sup>165</sup> In the UK, the Supreme Court recently affirmed that a driver's negligence may have greater causative potency than

<sup>159</sup> (2014) 67 MVR 297, 309 [54] (Basten JA) ('*Chivas*').

<sup>160</sup> *Ibid* 301–2 [14]–[16].

<sup>161</sup> See n 147.

<sup>162</sup> *Cosmidis* (n 140) 405 [48].

<sup>163</sup> *Ibid* 410 [70].

<sup>164</sup> *Ibid* 415 [99] (emphasis added). A third reason to support greater apportionment to the defendant is the causal potency argument: ie that a driver's negligence has a greater causal impact on the harm suffered (though this could be met by the view that a pedestrian who steps off the curb is endangering life, which is exactly the same danger created by the motorist). Admittedly, the causal potency concept is probably largely meaningless and has certainly not been explained: see generally James Goudkamp and Lewis Klar, 'Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion' (2016) 53 *Alberta Law Review* 849.

<sup>165</sup> More recently, the ACT Court of Appeal (applying NSW law) held that there is no basis for departing from the majority views expressed in *Chivas* and *Cosmidis*: see *Steen v Senton* (2015) 11 ACTLR 95, 104 [38]. This was despite the fact that, as the Court noted, a number of previous cases applied the earlier principles: at 100–1 [23]. Those previous cases include

that of a pedestrian because of the potentially dangerous nature of a car.<sup>166</sup> The UK does not, however, have legislation that may have the possible purpose of reversing that position.

## VIII CONCLUSION

We have argued that many scenarios, which seemingly raise difficult challenges for the 'reasonable person' standard, do not, in fact, do so, and do not involve any modification of that standard at all. Three broad situations have been identified in which questions of equivalence do not arise: (1) when the 'circumstances' in which the plaintiff or defendant finds herself or himself dictate the particular way in which the standard is applied (even if some judges might characterise this as setting the standard); (2) when, for reasons of policy, the plaintiff owes no duty to take reasonable care for her own safety; and (3) when the defendant's duty extends to protecting the plaintiff from a failure to take care for her own safety.

However, in a narrow class of case, equivalence is directly engaged and the courts have often sought to avoid applying it. We have outlined a number of different techniques by which courts might seek to achieve this. However, we have also argued that equivalence is not a legitimate approach, as the normative duty to look after one's own safety (ordinarily only relevant to plaintiffs) is not commensurate with the duty to safeguard others (which duty always arises for defendants, and only sometimes for plaintiffs). Of course, the *Ipp Report* had such arguments clearly in mind and unequivocally rejected them. Be that as it may, this normative distinction is implicit in the law's willingness to take account of certain personal characteristics when a person is engaged in some activities, yet to ignore those characteristics when a person is engaged in others. For example, when a person is involved in an activity such as driving, that activity appears to set a higher standard of care, notwithstanding the presence of personal factors that are ordinarily relevant to setting (and reducing) that standard, such as young age. This contrasts with an activity such as walking on a pavement, which does not impact upon the standard of care at all (that is, it is just a circumstance), and where factors such as age (and, we have argued, other personal characteristics including certain forms of disability) might therefore still be relevant in reducing the standard owed.

*Smith* (n 114) 529 [13]–[16] (Macfarlan JA), 532 [29] (Meagher JA); *Marien* (n 155) 13 [49], 14 [56].

<sup>166</sup> *Jackson v Murray* [2015] 2 All ER 805, 816 [40] (Lord Reed). For a useful critique of the causal potency rule, see Goudkamp and Klar (n 164).

Even the *Ipp Report* accepted that there cannot be a uniform application of the same standard to both plaintiffs and defendants in all circumstances, and inconsistent statements in the report reflect a discomfort with the consequences of adopting absolute equivalence. As we have demonstrated, some of the circumstances identified by the *Ipp Report* do raise issues as to the appropriate standard of care, such as the body of law on employee inadvertence. It is time that the law more directly confronted the two fundamental issues of when, indeed, equivalence even arises as a legal issue and, when it does arise, when and why it should be rejected.